IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-78

~~No. 1331~~

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

—v.—

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The orders of the United States District Court for the District of Utah entering judgment for plaintiffs in *Reyos v. First Security Bank* (Reyos herein), and dismissing *Affiliated Ute Citizens of the State of Utah v. United States* (*AUC* herein) on the merits and for lack of jurisdiction, are unreported (A.[1] 573

[1] "App." refers to the Appendix of pertinent Statutes and Regulations appearing at the back of this brief. "A" refers to the separately bound Appendix of proceedings herein. "E" refers to the Exhibit volume of the Appendix. "R" refers to the Record.

and 564, respectively). The opinions of the Court of Appeals for the Tenth Circuit reversing the *Reyos* judgment and affirming the dismissal of *AUC* are reported at 431 F.2d 1337 and 1349, respectively (A. 576 and 587).

JURISDICTION

The decisions of the Court of Appeals were simultaneously filed in June 19, 1970. Motions for rehearing in each case were simultaneously denied on November 14, 1970 (A. 588). A petition for rehearing in bane was filed in *Reyos* but was not considered (A. 3). The Petition for Certiorari was filed on February 9, 1971 and granted on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

The Ute Termination Act (Termination Act) is published at 25 U.S.C. §§ 677-677aa, and is reproduced in its entirety at App. i-xviii. The pertinent regulations under the Termination Act, formerly published at 25 C.F.R. part 243 are reproduced at App. xviii-xx. The relevant securities provisions are section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 adopted thereunder (17 C.F.R. 240.10b-5) (Rule 10b-5 or Rule) reading as follows:

15 U.S.C. § 78j:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

QUESTIONS PRESENTED

1. Whether bankers who contract to enforce the Indian laws and regulations applying to an Indian corporation, by acting as its transfer agent, depository for the individual Indian's stock, and agent for the conduct of the business of the corporation, violate Rule 10b-5:

(a) When they secretly act simultaneously as market makers for the stock, or as agents for or in aid of non-Indian purchasers?

(b) When they cause stock transfers to be made in a manner other than as specified in the Indian laws and regulations?

(c) When they withhold information designed to discourage the Indian from selling his stock?

(d) When they alter or misrepresent documents filed with government officials primarily responsible for supervising the sale of Indian property?

2. Does the reference to conduct "in connection with the purchase or sale of any security" in Rule 10b-5 mean that the defendant must be acting in his own interest, as a purchaser or seller, for a profit?

3. Under an Indian termination act, declaring a phased withdrawal of Government services rendered to Indians and an end to supervision of their restricted property:

(a) Are the Indians deprived, by implication, of any interest in their property, or do they lose their cultural identity as American Indians so that benefits of law other than under Federal statutes are eliminated by implication?

(b) Is BIA's administrative modification or acquiescance in the modification of termination procedures prescribed by Congress, so that protections to Indians and their property are eliminated or reduced, actionable negligence?

(c) Does publication of a "termination proclamation" eliminate the Government's duty to Indians with respect to limited supervisory functions Congress directed be performed after publication, or as to property over which the Government retains limited supervisory control?

4. The subsidiary question in *AUC* of whether the United States District Court has jurisdiction to determine an Indian's rights in property, including management rights, purportedly granted under a termination act?

5. The subsidiary question in *Reyos* of what relief is appropriate to the individual Indian?

STATEMENT OF THE CASE

A. *Summary of the Proceedings Below.*

AUC is an unincorporated association of all terminated Ute Indians formed by the Secretary of Interior (Secretary).

AUC's complaint sought confirmation of rights under the Termination Act (1) in its own behalf, to exercise management privileges for its members with respect to their unadjudicated legal claims and the mineral estate in the Uintah and Ouray Reservation (Reservation), and (2) on behalf of its 490 Indian members, declaring them to be vested with beneficial rights in the Reservation minerals. The *Reyos* plaintiffs are members of AUC who seek damages for their loss of mineral royalties and Indian claims payments from and after 1963-64, which occurred when the Bureau of Indian Affairs (BIA) caused the terminated Utes' share of the cash proceeds to be paid to a corporation in which they formerly held stock. The Indians had sold, or were induced to sell, their stock in transactions which the trial judge determined to be fraudulent, and the Indians' shares in the cash proceeds were paid to the non-Indian purchasers.

The Complaint in *AUC* was dismissed for alleged failure to state a cause of action and lack of jurisdiction. The trial judge awarded damages to the *Reyos* plaintiffs against First Security Bank of Utah, N.A., (Bank) and its officers, Gale and Haslem, under Rule 10b-5, and against the United States for negligent administration of the Termination Act. The Court of Appeals for the Tenth Circuit affirmed the dismissal of *AUC*, and reversed the judgment in *Reyos*, ruling that the United States owed no duty to the terminated Utes and that the Bank and its officers had not violated Rule 10b-5.

B. *Summary of the Termination Act.*

The Termination Act provided that as to 27.16186% of the membership of the Ute Indian Tribe (Tribe) federal supervision and services to the Indians would be ended[2] and restrictions on their property would be removed.[3] The mineral estate in the Reservation, which was both difficult to divide and an intangible asset the terminated Utes could be expected

[2]Section 23, 25 U.S.C. §677v (1964), App. xvi.
[3]Section 16, 25 U.S.C. §677o (1964), App. xiii.

to have trouble dealing with, was excepted from the removal of "restrictions" and was to be held by the United States, with the beneficial interest retained in common among the terminated and non-terminated Utes.[4] The "termination proclamation" ending supervision of the individual Indian was published on August 26, 1961, but Congress directed that real property be subject to limited supervision by the Secretary, pursuant to a right of refusal in the "members of the tribe" until August 27, 1964.[5]

The mineral estate was and is subject to joint management by the "authorized representative" of the terminated Utes and the Tribe as the representative of the non terminated Utes.[6] Title to the mineral estate remains in trust with the United States for the Indians beneficially entitled to it.

C. *The "Authorized Representative" Problem.*

AUC claims that it is the "authorized representative" specified in the Termination Act, and that Ute Distribution Corporation (UDC) was improperly substituted in its stead. The authorized representative is empowered to act with the Tribe in the approval of mineral leases, but more importantly, represents the persons entitled to the cash proceeds from the minerals. If UDC is the authorized representative, the non-Indian purchasers of the UDC stock are entitled to those payments. If AUC is the proper authorized representative, those who are entitled are its Indian members.

The Termination Act provided that the authorized representative was to be selected by "an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary." [7]

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[4] *Id. See also* section 10, 25 U.S.C. §677i (1964), App. vi at viii.
[5] Section 15, 25 U.S.C. §677n (1964), App. xii.
[6] Section 10, 25 U.S.C. §677i (1964), App. vi at vii.
[7] Section 6, 25 U.S.C. §677e (1964), App. iii.

The Secretary approved the formation of AUC as the authorized representative on April 4, 1956, and the constitution and bylaws of AUC were ratified by a majority vote of the adult mixed-blood members of the tribe in the manner specified by Section 6 of the Termination Act on May 12, 1956.[8] Thereafter AUC was recognized as the authorized representative by the United States for a period of several years.

On December 9, 1958, BIA caused UDC to be formed under the laws of the State of Utah. UDC was formed by 5 incorporators and its charter recited that it was formed "to manage jointly with the tribal business committee" the terminated Utes' interest in the mineral estate, but it was not formed pursuant to a "constitution and bylaws" nor was it "ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary."[9]

Thereafter BIA "acquiesced" in UDC's acting as authorized representative and paid all proceeds from the Indian claims and the mineral estate to UDC to be paid to its stockholders in the form of dividends. AUC, which had been recognized as the "authorized representative" was ignored, although AUC never purported to delegate its powers to act as authorized representative.[10]

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[8]See defendants exhibits U-C, E. 151 at 162, and U-D, E. 163. (All exhibits were received in bulk pursuant to the Pre-Trial Order. A.24. Pertinent testimony concerning particular exhibits is hereafter indicated.)

[9]Plaintiffs exhibit 16-A, E. 1. In plaintiffs exhibit 22, E. 18, the "general membership" of AUC purported to "accept such articles of the Ute Distribution Corporation as it is thus written" by a vote of 42 for and 5 against, far short of a majority of the 490 mixed-bloods. The meeting was not a "special election authorized and called by the Secretary" for the purpose of selecting an authorized representative. Even were deficencies absent and even if the corporate charter could be considered a "constitution and bylaws," the purported action of the general membership was abortive in view of the plain provision of Section 6 that "*in the event that no such approved organization is effected,* any action taken by the adult mixed-blood members, by majority vote . . . shall be binding upon said mixed-blood members." (Emphasis added) An approved organization *had* been effected prior to that date.

[10]Resolution no. 59-8, which is not contained in the record, was adopted on January 1, 1959, purporting to delegate to UDC the powers contained in Article 5, Section 1, Paragraph (b) of the AUC constitution. That

D. *The UDC Stock Sales.*

The substitution of a corporate charter for the constitution and bylaws prescribed by the Termination Act injected a new element into Congress' termination program—corporate stock is subject to sale, but membership in the unincorporated association, like a person's citizenship, is not. Apart from the question of the propriety of the formation of UDC, however, the sales of UDC stock to non-Indians were accomplished in a manner which deviated from the regulations adopted by the Secretary. That is, whether the Secretary had authority to do so or not, he did form UDC and promulgate regulations concerning it, and if he had required strict compliance with those regulations the improper sales could not have occured. The *Reyos* plaintiffs claim the action of BIA in permitting the deviation was negligent and that the course of business employed by the Bank's officers pursuant to the deviations amounts to fraud.

Each terminated Ute was credited with 10 shares in UDC, which were held in his name by the Bank at its offices in Salt Lake City, over a hundred miles from the Reservation. The stock bore a *red letter legend*, warning the Indian of its value, and further legends advising him of restrictions on its sale.[11] The purport of the red legend was to advise the shareholder of the essential declaration of Congress that the mineral estate *should not be sold*. Any protection to the Indian was eliminated, however, by the additional legend on the reverse side[12] declaring that the stock *could* be sold as if it were real property. Neither warning was communicated to the Indians, however, because the Bank refused to permit them access to their stock certificates, even when they requested that it do so,[13]

Resolution did not have the effect of delegating the powers of authorized representative, however, for those powers are contained in Article V, Section 1, Paragraph (a). See defendants exhibit U-O, E. 151 at 55.

[11]Plaintiff's exhibit 101, E. 106, 107, A.28.

[12]*See also*, 25 C.F.R. § 243.12 (1962) (deleted 1969), App. xx.

[13]A.516. *See also*, plaintiff's exhibit 48-Z, A. 284, 287.

and made no alternative effort to advise the Indians of the warnings in any way.[14]

The BIA then established the Bank as transfer agent to supervise the mechanics of sale and to assist UDC as "business agent."[15] The stock sales in question took place largely during calendar years 1963 and 1964, after termination of the person but before the end of the first refusal option available to the members of the tribe.

The regulations stipulated that in the event of sale there be a prior offer to the "members of the tribe" at a stated cash price, to be paid to the Superintendent of the Uintah and Ouray Agency (Superintendent).[16] If the offer was not accepted, the Indian could sell to any person at the same or a greater price and on the same terms and conditions.[17] In that event, the Indian was to endorse the certificate itself[18] and the Superintendent was to attach his certificate that the regulations had been complied with and deliver it to the non-Indian purchaser.

The Bank found these regulations inconvenient, however, and proposed an alternate procedure which was easier for it to administer,[19] and which also encouraged the transfers which Congress sought to discourage, if not to prevent entirely. The alternate procedure permitted the transfer on a separate stock power and certification to the *Bank*, rather than the *purchaser*, that the restrictions had been complied with. In lieu of pay-

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[14] A. 287-88.
[15] A. 468-69. The agreement is plaintiff's exhibit 18, E. 13, A. 275-76.
[16] *See* the Articles of Incorporation of UDC, Article VIII, in plaintiff's exhibit 16A, E. 1 at 6, and the form used for the offer in plaintiff's exhibit 50. E. 41, A. 207.
[17] 25 C.F.R. § 243.8 (1962) (deleted 1969), App. xx, and plaintiff's exhibit 50 E. 37, A. 207.
[18] The face of the certificate reads: "transferable only . . . upon surrender of this Certificate properly endorsed." Plaintiffs exhibit 101, E. 106, A. 28. The regulations incorporated all restrictions printed on the certificate. 25 C.F.R. § 243.12 (1962) (deleted 1969), App. xx.
[19] A. 519.

ment through the Superintendent, the Indian was required to furnish an affidavit to the effect that he had been paid.[20] The Superintendent was informed of the changes by the Bank and he acquiesced in them, although they were never made a part of the regulations.[21]

The officers of the Bank, at its Roosevelt office located on the Indian Reservation, then began trafficing in the stock—performing functions which were substantially those of a broker in the regular securities markets. They located purchasers of the stock throughout the United States, who maintained substantial deposits in the bank for the purpose of making purchases.[22] They also arranged for agents, usually used car dealers, who contacted Indians during periods of economic crisis, sometimes contrived (as in the case of Melvin Reed, who was subjected to a large fine for drunkenness by one of the Bank officers acting in the capacity of Justice of the Peace[23]), and sometimes already existent (as in the case of Letha Wopsock who needed money because she had been requested by the Chief to operate a concession stand for the annual Sun Dance[24]). Such market as ever existed for the UDC stock was largely maintained by the Bank officers for their out of state clients,[25] at prices fixed by the Bank officers in Roosevelt and at its central office in Salt Lake City.[26]

The occasional sales which were not connected with the Bank officers, either as principal or agent, were determined by the trial judge to have been influenced by their practices. The

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[20] A. 518-519.
[21] A. 505-06.
[22] A. 500, 522. *See also* plaintiffs exhibit 104, E. 108-119, A. 76.
[23] A. 484-86.
[24] A. 41.
[25] The trial judge so concluded at A. 529.
[26] *See* plaintiffs exhibit 58, E. 64, A. 330, where the trust officers of the Bank determined that "$5,000 [for 10 shares] may be too much, a value of approximately $3,500 may be nearer to the real value." The Bank officers then established $350 per share as the standard price. E.g., A. 480.

individual circumstances of the Indians — their destitution, naivete, chronic alcoholism — were important facts in the trial judge's conclusions and are spelled out in some 74 pages of meticulous fact findings which cannot be detailed here. The mechanics of these sales fit a typical pattern, however.

After an Indian seller was located, he was required to sign two blank forms,[27] and his signature was notarized and "guaranteed" by the Bank officers. The blanks were later filled in with the name of the purchaser and although the Indian was paid primarily with used cars or other merchandise, the cash figure stipulated in the offer of sale the Indian had earlier filed with the Superintendent was always inserted in the forms. In most cases the completed forms were sham to the extent that the Indian did not deal with the purchaser indicated nor did he receive the amount of cash recited. In most cases he received whatever small amount of cash was required to meet his emergency needs and a used car or other chattel which was represented as making up the difference, for which he gave up mineral rights which plaintiffs expert witnesses appraised at over $28,000 per share.[28] Often the Indian had no use for the car, as with Mrs. Case who could not even drive and had to get someone to take it home for her.[29] She had to take the car, however, to get the desperately needed cash.

The forms were then submitted to the Realty Officer for the BIA, who duly noted their irregularities but took no action because she had been advised by the Superintendent to do nothing to protect the Indian.[30] The Superintendent then certi-

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[27] Plaintiff's exhibit 72A, E. 97, A. 72.

[28] See footnote 165, *infra*.

[29] A. 483, 307.

[30] See plaintiff's exhibit 54, E. 55, A. 211-13, where R. O. Curry, the son of Oran Curry, protested irregularities in the sales procedure. The Realty officer's note in the margin reads: "Note for Files. This memo was discussed with Mr. Z [Superintendent Zollar], but he did not think the points raised should be a further concern of ours since the members have been terminated; the stock is unrestricted, and they are therefore free to do whatever they wish as long as the Bureau complies with CFR 243 which we still do til 8-27-64."

fied to the Bank that the sale was in accordance with the regulations, and the stock was transferred.

SUMMARY OF ARGUMENT

1. (a) The conduct of the Bank and its officers, in withholding information printed on the stock certificate designed to discourage the Indian from selling, failing to disclose their brokerage activities, acting as agent for others in disregard of their fiduciary duties to the Indians, establishing a transfer procedure which varied from the requirements imposed by the Indian laws, and in general preying upon the less informed Indians and exploiting their economic difficulties, were matters material to the Indian's sales which violated each of the three separate clauses of Rule 10b-5.

(b) With respect to the "non-principal" transactions, the defendants need not be directly engaged as a purchaser or seller, *Mills v. Electric Auto-lite Co.*, 396 U.S. 375 (1970), nor in privity of contract with the seller, *Heit v. Weitzen*, 402 F.2d 909 (3rd Cir. 1968) *cert. denied* 395 U.S. 903 (1969); *Mitchell v. Texas Gulf Sulphur Co.*, ... F.2d ..... (10th Cir. April 26, 1971). Liability in non-principal transactions is particularly appropriate under the "directly or indirectly" and "in connection with" language of the Rule, and under the related concepts of conspiracy and aiding and abetting. *Brennan v. Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Ind. 1966) *aff'd* 417 F.2d 147 (7th Cir. 1969) *cert. denied* 397 U.S. 989 (1970).

(c) Liability may not be circumscribed on the theory that the alleged misconduct is a common banking practice, nor may the defendant interpose a defense based upon lack of reliance. *Mills v. Electric Auto-lite Co., supra; SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). The appropriate limit of Rule 10b-5 liability should be causation, but only causation in the "but for" sense.

2. (a) Indian laws must be construed liberally, in the manner most favorable to the Indian. *Choate v. Trapp*, 224 U.S. 665 (1912). The policy of liberal construction also applies to statutes giving Indians a forum in which to enforce their rights. *McKay v. Kalyton*, 204 U.S. 458 (1907). For the purpose of jurisdiction under 25 U.S.C. §345, an Indian may test his beneficial rights in the Reservation mineral estate which was granted under the Termination Act. Such an interest is also within the meaning of the term "allotment."

(b) AUC should be determined to be the "authorized representative" under the Termination Act because it was formed by a constitution and bylaws, approved by majority vote of the terminated Utes who were adults, at a special election called for that purpose by the Secretary, while UDC was simply formed under state law without complying with 25 U.S.C. §677e. The unincorporated association was prescribed by Congress to exercise the authorized representative powers, to prevent transfer of those rights to non-Indians, with the consequent disruption of Indian affairs. The Secretary should not be permitted to substitute his judgment for that of Congress in determining the proper form of authorized representative.

(c) The United States was negligent in implementing the Termination Act by (1) allowing UDC to replace AUC as authorized representative, (2) failing to require compliance with the sales procedure prescribed by the regulations (in particular, failure to require cash payment and compliance with formal requirements which would have made the fraud of others unlikely), (3) failing to protect the "members of the tribe" in their right of first refusal and (4) in failing to protect the Indian's interest in the mineral estate, which was retained in the hands of the United States subject to "restrictions."

3. Appropriate relief should be devised to make the Indians who sold their stock substantially whole, yet not penalize those who did not sell. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Appropriate relief in this case should include (1) con-

firmation of AUC's management rights as authorized representative, (2) confirmation of AUC's members' rights to beneficial title in the minerals (which will benefit sellers and non-sellers alike) and (3) requiring the defendants to reimburse all selling shareholders in an amount equal to their share of the funds delivered to UDC from the time of sale to the date of judgment upon remand.

ARGUMENT

I

THE CONDUCT OF THE BANK AND ITS OFFICERS VIOLATED RULE 10b-5

A. *Statement.*

First, and fundamentally, the plight of the terminated Utes is the result of violations of Rule 10b-5 by the Bank and its officers. The United States, whose liability is limited to its negligence in failing to require strict compliance with the mandate of Congress, is not a defendant in the fraud claims.[31]

The trial judge entered exhaustive findings, comprising 74 pages of the Appendix, dealing with every facet of the Rule. The Court of Appeals not only rejected the findings, but undertook to inject additional elements into Rule 10b-5's formula so that the misconduct of the Bank and its officers could not qualify as its proscribed product. This was done in two basic ways. First by construing the required "participation" (which was evidently shorthand by the Court of Appeals for the terms "in connection with" and "directly or indirectly" employed in the Rule), and the supposed defenses of lack of reliance or casuation, in such a manner that the bank and its

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[31] The Bank is also responsible for the deviations from Congressionally prescribed procedures. A. 518-19. The Bank's letter directing the change in the transfer procedure is defendants exhibit FD, E. 131, A.208.

officers were not within the equation, at least in what may be characterized as the "non-principal" transactions—those sales in which the Bank officers acted in the capacity of broker or where their connection was merely collateral to the sales transaction. Second, by viewing the activities of the Bank and its officers, arising in juxtaposition with the Indian laws, as *banking* transactions and not *securities* transactions and therefore not subject to regulation under the Rule.

Both of these approaches raise basic problems under Rule 10b-5 which have never before received the attention of this Court.

The 74 pages of detailed findings of fraud obviously cannot be summarized in the space of this brief, nor may the evidence supporting them be reviewed in any meaningful way. Such findings are traditionally accorded a presumption of accuracy, but in this case the Court of Appeals rejected them out of hand, frequently charging that they were not supported by evidence, but without any analysis of what the evidence on any point was or wherein it was deficient. Instead, it was observed that "each plaintiff states a separate cause against each of such defendants,"[32] followed by a discussion of the defendants misstatement of the prevailing market price "in those instances wherein they purchased stock for sale at a personal profit,"[33] as if misstatement of price were the only matter at issue. It is important, therefore, to briefly review the trial judges' determinations as a prelude to discussion of the legal questions presented by their rejection on appeal.

As regards clause (b) of the Rule (misstatement or omission of material fact), the Court of Appeals acknowledged that misstatements as to price affected *some* plaintiffs, but ignored the withholding of the important legends which affected *all* plaintiffs. The defendants also concealed their market making

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[32] A. 583.
[33] A. 585.

activities and the substantial funds on deposit for stock purchases. As regards clause (a) of the Rule (schemes to defraud), the bank officers, both directly and through arrangements with used car dealers,[34] acquired and sold the stock, employing devices which circumvented the Regulations — the requirement that the Indian receive a minimum advertised cash consideration in particular. As regards clause (c) of the Rule (any course of business which would operate as a fraud), the Bank contracted to see that the transfers were properly made,[35] but nevertheless notarized affidavits known to be false [36] and prevented the corporation from protecting the Indians by falsely assuring its officers that payment of the full advertised price in cash was being required as a condition to the Bank's approval of the sale.[37] Moreover, in an act which directly aided each and every stock transfer, the bank prescribed the affidavit system itself, which was the ultimate undoing of the Indians, in violation of the requirements of the Regulations. Gale and Haslem also abused the inside information concerning the corporation which was in their possession [38] and performed significant steps in implementing each of the "non-principal" sales.[39]

This Court is thus presented with an assortment of acts which *could* be viewed as violating the provisions of the Rule, ranging from simple abuse of confidential relationships of a sort which is common in other commercial relationships, extending through breach of federal regulations dealing with matters collateral to the securities transaction, and including falsification of documents which could be considered criminal in certain settings.[40] This Court has never directly decided what conduct is proscribed by the Rule, though it has treated

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[34] *See* note 65 *infra*, and accompanying text.
[35] A. 513, 276.
[36] A. 501.
[37] A. 516, 336-37; plaintiff's exhibit 58, E. 80, A. 336.
[38] A. 521.
[39] A. 523.
[40] *See e.g.*, 18 U.S.C. §1001 (1964).

closely related questions under the Exchange Act and other federal securities laws which are in *pari materia*.[41]

B. *A Showing of "Privity" or direct "Participation" in a Securities Transaction, "For a Profit," is Not Required Under the Rule.*

The Court of Appeal's dominant thrust was to exclude the defendants from liability in the "non-principal" sales by holding that they were not sufficiently connected with the securities transaction unless they were *personally* involved, *for a profit*. The activities found by the trial judge were not considered a sufficient "participation," in the view of the Court of Appeals.

> The record shows that the defendent Gale purchased for resale *for his personal profit* ten shares of UDC stock from two of the plaintiffs.
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> * * *
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> The record does not show whether or not the defendant Gale *participated for his personal profit or derived a personal profit* from the purchase by other persons of shares of stock from the plaintiffs.
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> * * *
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> As to the elements to be established, the record shows that the individual defendants made a misstatement of a material fact in representing, *in those instances wherein they purchased stock for sale at a personal profit* . . .[42] (Emphasis added).

In so holding, the Court of Appeals severely restricted the language of the Rule, which prohibits "any" fradulent practices accomplished "directly or *indirectly*" or "*in connection with*" the purchase or sale of "any" security.[43]

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[41] SEC v. National Securities, Inc., 393 U.S. 453 (1969); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

[42] A. 583-85. See footnote 92, *infra*.

[43] See Amicus Curiae Brief for SEC in Manhattan Casulty Co. v. Bankers Life and Casualty Co., Docket No. 1159 (October Term, 1970) at 17, where it was said that the restriction "that the fraud must affect the

1. The Defendant Need Not Be a "Purchaser" or a "Seller".

The Court of Appeals distinguished the direct purchases by the Bank's agents from the "non-principal" transactions, finding liability only in the former instances and then only because of a misrepresentation as to *price*. The literal effect of the distinction was to exclude fraud merely incidental to a securities transaction from the Rule's ban, even if its avowed purpose is to affect the purchase or sale of securities or aid others in a fraudulent purchase. The holding bears overtones of the so-called "Birnbaum doctrine,"[44] which is currently undergoing review by this Court.[45] Because it is being extensively briefed and argued in other proceedings before this Court, we shall not dwell long on this aspect of the case. Even if any aspects of the Birnbaum doctrine should survive this Court's review, however, the concept has never been applied so mechanically as by the Court of Appeals herein.

In the closely related context of proxy solicitations incident to a merger under section 14(a) of the Exchange Act, this Court has recently held that the effect of allegedly misleading practices upon the Congressional purpose of ensuring full and fair disclosure must be considered in determining if a cause of action is stated.[46] The Courts of Appeals,[47] including the Second

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value which changes hands in the security trade itself" is contrary to the prior decisions of this Court, and at 21, where it was observed that the Rule "does not specify which material facts must be misrepresented or omitted before a cause of action for federal securities fraud arises; the rule speaks of 'any' untrue statements of material facts . . . The presence of misrepresentations with respect to the investment value of the securities that are the subject of the securities transactions has never before been thought necessary."

[44] *See* Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), *cert denied*, 343 U.S. 956 (1952).

[45] *See* Manhattan Casualty Co. v. Bankers Life and Casualty Co., Docket No. 1159 (October Term, 1970).

[46] Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

[47] *See, e.g.*, Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970) *cert. denied* ..... U.S. ..... (March 1, 1971); Kahan v. Rosenstiel, 424 F.2d 161, 172 (3rd Cir. (1970), *cert. denied, sub nom.* Glen Alden

Circuit [48] which authored the Birnbaum doctrine, have frequently refused to apply the doctrine in cases under Rule 10b-5 in such a fashion that fraudulent practices of the sort the Rule was clearly directed against are exempted, even though those practices are not a part of a securities transaction in the customary sense.[49] The Securities and Exchange Commission, whose views should be accorded great weight, has said of the "in connection with" language: "The Commission [believes] the phrase does no more than confine Section 10(b) to cases in which securities are involved as distinct from fraudulent conduct generally." [50]

2. Privity of Contract Should Not be Required.

The Court of Appeal's requirement of direct participation, for a profit, further emasculates the Rule by injecting a requirement of privity into the equation. Moreover, it is privity of contract, rather than mere privity to the false statement or misleading practice, which the Court of Appeals has required. Thus, though Rule 10b-5 is universally acclaimed as an *expansion* of the common law concept of fraud,[51] the Court of Appeals has read it much more restrictively, for even at common law a showing of privity was not required in all cases.[52]

Corp. v. Kahan, 398 U.S. 950 (1970); Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960), *cert denied*, 365 U.S. 814 (1961); Errion v. Connell, 236 F.2d 447 (9th Cir. 1956).

[48] *See* A. T. Brod & Co. v. Perlow 375 F.2d 393 (2d Cir. 1967); Vine v. Beneficial Finance Co., 374 F.2d 627 (1967); Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), *cert denied*, 395 U.S. 906 (1969).

[49] See Amicus Curiae Brief of SEC in Manhattan Casualty Co. v. Bankers Life and Casulaty Co., Docket No. 1159 (October Term, 1970) Pages 24-25 and authorities there cited.

[50] Brief of SEC Amicus Curiae in support of the Petition for Certiorari in Manhattan Casualty Co. v. Bankers Life and Casualty Co., Docket No. 1159, (October Term, 1970), page 8.

[51] *See, e.g.* A. BROMBERG, SECURITIES LAW: FRAUD, S.E.C. RULE 10b-5, §3.2 (1969).

[52] *See, e.g.*, Pasley v. Freeman, 100 Eng. Rep. 450 (K. B. 1789); Peek v. Gurney 43 L. J. (n.s.) 19 (1873). *Accord*, Joseph v. Farnsworth Radio & Television Corp., 198 F.2d 883, 885 (2d Cir. 1952) (dissent); *Comment*, 4 STAN. L. REV. 308 (1952).

When it is considered that the Court of Appeals did recognize a misrepresentation as to value, at least, as a fraudulent practice under the Rule, one must grasp for the Court of Appeal's liability concept. If Gale, acting as agent for Elmo Matthews[53] or Bernice Vannoy[54] in Phoenix, or Haslem acting as agent for the Shaw Trust[55] or Walter K. Howard[56] in Illinois, cannot be liable for their misrepresentations, could the out of state purchasers who were their principals and who were neither party to nor had knowledge of any misrepresentations be liable? If they could be, then how could the Bank be excused of liability for the activities of Gale and Haslem, or for similar activities of the Bank officers in Roosevelt and Salt Lake City.[57] If neither the out of state principals nor the Bank may be liable, then has not the Court of Appeals made a mockery of the implied remedy this Court created in the *Borak*[58] case? Has not a convenient avenue been opened for the commission of fraud with impunity, through the use of agents?

This Court's considered dictum in *SEC v. Capital Gains Research Bureau Inc.*,[59] is its only expression on the subject:

> Even in a damage suit between parties to an arm's-length transaction, . . . "it is not necessary that the person making the misrepresentation intend to cause loss to the other or gain a profit for himself" . . . "(T)he fact that the defendant was disinterested, that he had the best of motives, and that he thought he was doing the plaintif a kindness, will not absolve him from liability, so long as he did in fact intend to mislead." (citations omitted)

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[53] *See* plaintiff's exhibit 68C, E. 95, A. 119. *See also* plaintiffs exhibit 104, E. 108-19, A. 76, which is the record of Matthews account.

[54] *See* plaintiff's exhibit 65 B, E. 93, A. 64.

[55] *See* plaintiff's exhibit 64J, E. 87, A. 458, and Haslem's handwritten summary of profits, plaintiff's exhibit 64K, E. 89.

[56] *See* plaintiff's exhibit 64 H, E. 86, A. 461.

[57] *See* plaintiffs exhibits 64D, E. 85, and 66, E. 94, A. 450 offering the trust department "another snickle" (i.e. a financial gratuity).

[58] J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

[59] 375 U.S. 180, 192n 39 (1963).

The Court of Appeals was directed to the foregoing dictum, but merely brushed it aside with its observation that "these [SEC enforcement proceedings] are from an entirely different position." [60] Presumably, the reference was to the assumption of some that SEC need not make as stringent a showing when it seeks to apply the "mild prophylactic" of injunctive relief as when a private litigant seeks relief directly by way of money damages. Surely that is true in the sense that neither damages nor causation need be shown as a prerequisite to SEC injunctive relief, but beyond that no reason is apparent why the other elements of the Rule – fraud, deceit, misrepresentation, in connection with, etc. – should have a different meaning in the two settings.

It would be a curious anomally, we submit, if the stockholder the Rule is designed to protect, particularly stockholders such as these Indian plaintiffs whose need for protection is maximum, must make a stronger showing on the fundamental ingredients of the Rule when they bring suit in their own behalf than SEC must do when it acts indirectly in their right. Therefore, this Court should now either apply its *Capital Gains* and *Borak* dictum, or declare that such remedies are available only to SEC when it seeks an injunction.

The federal courts have been rather consistent in their reading of the "in connection with" and "directly or indirectly" language of the Rule as not implying any privity requirement. *E.g. Heit v. Weitzen*: [61] "There is no necessity for contemporaneous trading in securities by insiders or by the corporation itself. 'Rule 10b-5 is violated whenever assertions are made . . . in a manner reasonably calculated to influence the investing public. . .'"

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[60] A. 586.

[61] 402 F.2d 909 (2d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969). *See also* Meisel v. North Jersey Trust Co. 218 F. Supp. 274, 279 (S.D.N.Y. 1963) (the Rule is violated if the defendant "knew that anything it did or said, or failed to do or say, would influence the plaintiff").

Indeed, in a particularly well reasoned opinion subsequent to the matter at bar, Judge Delmas Hill categorically rejected the requirement of privity which was imposed herein, and read the "in connection with" requirement with appropriate liberality."

> "We do not believe that Congress intended that the proscriptions of the Act would not be violated unless the makers of a misleading statement also participated in pertinent securities transactions in connection therewith, or unless it could be shown that the issuance of the statement was motivated by a plan to benefit the corporation or themselves at the expense of a duped investing public." SEC v. Texas Gulf Sulphur Company, 401 F.2d at 860. . . .
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> . . . . Perhaps the first step is to realize that the common law requirement of privity has all but vanished from 10b-5 proceedings while the distinguishable "connection" element is retained . . . . As appropriately stated by the Second Circuit, "a corporation's misleading material statement may injure an investor irrespective of whether the corporation itself, or those individuals managing it, are contemporaneously buying or selling the stock of the corporation." [62]

3. Indirect Conduct and Conspiracy.

The Court of Appeals rejected the trial court's findings of liability of the Bank and its officers based upon indirect dealings, including the aider and abettor and conspiracy concepts in particular,[63] summarily: "The record does not support the trial court's finding of a conspiracy, plan, or scheme. . . . The trial court was in error in so finding."[64] Conspiracy and aiding and abetting are concepts which are rarely subject to direct proof, yet here one of the co-conspirators, Nick Murray, actu-

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[62] Mitchell v. Texas Gulf Sulphur Co., ... F.2d ..... (10th Cir., April 26, 1971)
[63] A. 521-22, 527, 536.
[64] A. 587.

ally testified of his arrangements to split profits with Gale on purchases for Elmo Matthews and others.[65]

It is beyond question that Gale and Haslem, who were obligated under the Bank's contract to act in the interest of the Indian shareholders,[66] actually worked with non-Indians in the purchase of the stock.[67] When the corporation learned that sales were being made for old automobiles, in violation of the regulations, its lawyer notified the bank by letter that no sales should be completed "unless the full cash purchase price is left with the Bank" [68] and the UDC directors held meetings with the Bank officers on the subject.[69] Gale then frustrated their efforts by *misrepresenting* to the corporation that the Bank was requiring the full cash price in accordance with the terms of the offer.[70]

There is no room for doubt that these used car dealers, if not acting in conspiracy with the Bank officers, were at least aided and abetted by them. On one occasion they appeared at a UDC directors meeting as a group, with a Bank officer, demanding that the transfer of shares be expedited in the interest of the non-Indian purchasers.[71] Indeed, the manner in which the Bank assisted non-Indian purchasers, furnishing information[72] and records[73] and the informality with which transfers were executed when requested by a used car dealer,[74] is consistent only with the trial judges conclusion that the Bank was aiding and abetting these illegal purchases. The Court of

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[65] A. 113-19.
[66] *See* plaintiff's exhibit 19, E. 16, A. 275.
[67] *See*, plaintiff's exhibits 65B and 68C, E. 93 and 95, A. 64, 119, concerning arrangements involving Gale and plaintiff's exhibit 64J., E. 87, concerning arrangements involving Haslem.
[68] Plaintiff's exhibit 60B, E. 82, A. 336.
[69] *See* plaintiff's exhibit 58 E. 56 at 70, A. 330.
[70] *Id.* at E. 80. The trial judge's finding is at A. 516.
[71] Plaintiff's exhibit 38 at E. 75-76, A.330.
[72] *See* plaintiff's exhibits 64D and 73, E. 85 and 98, A. 81.
[73] *See* Plaintiff's exhibit 70, E. 96. Compare the testimony of Orran Curry, who was refused information concerning his stock. A.150-51.
[74] *See* plaintiff's exhibit 49 A., E. 35.

Appeals also ignored that the price of the stock was actually set by the trust officers of the Bank,[75] who were simultaneously assisting, for a fee, in executing the illegal purchases by non-Indians.[76]

As regards dealings such as these by the Bank and its officers, it has been appropriately said that "the hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare." [77]

Brennan v. Midwestern United Life Insurance Co.,[78] is the principal authority applying the aider and abetter concept to private actions under Rule 10b-5, though other cases have reached analogous results, sometimes relying on the "directly or indirectly" language of the rule.[79] The Court of Appeals for the Seventh Circuit applied these concepts to brokers performing the same approximate functions of the Bank and its officers herein in *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[80] and held that if the defendant "knew or should have known" of the fraudulent conduct of others and was in a relationship of trust or confidence with the plaintiff his mere in-

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[75] *See* plaintiff's exhibit 58, E. 56 at 64, A. 330.

[76] *See* plaintiff's exhibit 66, E. 94, A. 450. *Also see* plaintiff's exhibits 60Q and 65A, E. 83 and 92, A 67 illustrating how the Bank officers circumvented the regulations by purchasing stock before the offering procedure was completed.

[77] Lennerth v. Mendenhall 234 F.Supp. 59, 65 (N.D. Ohio 1964). Liability based on such indirect dealings is peculiarly appropriate under the "directly or indirectly" language of the Rule. *See also* 18 U.S.C. §2(a) (1964) concerning aiding and abetting. *See also* Sutro Bros. & Co., 41 S.E.C. 443, 458 (1963).

[78] 259 F. Supp. 673 (N.D. Ind. 1966) aff'd 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

[79] Globus v. Law Research Service, Inc., 287 F. Supp. 188 (S.D. N.Y. 1968); Escott v. BarChris Construction Corp., 283 F. Supp. 643 (S.D. N.Y. 1968); Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y. 1967).

[80] 410 F.2d 135, 144 (7th Cir. 1969), *cert. denied*, 396 U.S. 838 (1970).

action could create liability.[81] The same concept has been applied to a Bank where it effectuated a fraud by its mere silence.[82]

C. *The Rule Is Not Circumscribed by Banking Practices, Provisions of State Law or Contract Arrangements.*

The Court of Appeals Stressed the contract committments between the Bank and UDC.[83] It was then concluded that, because the contract was a customary banking transaction, it could not be the basis of an action under the Rule.

> The 'participation' by defendant Gale in the execution of documents as shown by the record in connection with these sales cannot constitute a breach of duty on his part to any of the plaintiffs. In this connection he did no more than to perform ministerial functions required to carry out the transfer of the shares of stock.[84]

The Securities laws were thus emasculated, at least as regards banking transactions, for it is universally recognized that the Rule creates a duty which is additional to and in most cases more exacting than that of collateral business arrangements, or state laws dealing with banking[85] or other matters. No statutory

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[81] *Accord*, Pettit v. American Stock Exchange, 217 F. Supp. 21, 28 (S.D. N.Y. 1963). *See also* II L. Loss, SECURITIES REGULATION 3892 (1969 Supp.).

[82] Carroll v. First National Bank, 413 F.2d 353 (7th Cir. 1969); *cert. denied*, 396 U.S. 1003 (1970).

[83] *See* A. 581, 582. The Court of Appeals said that the contract did not require the Bank to discourage sales, but it did provide that "the corporation will instruct the Bank from time to time concerning the Bank's duties." Plaintiffs exhibit 18, E. 13, A. 275. The corporation did instruct the Bank "to discourage the sale of stock . . . and to emphasize and stress to the said stockholders the importance of retaining said stock." Plaintiff's exhibit 26, E. 19, A. 281. The Bank had also represented in negotiating the contract that it "would be acting for the individual stockholders." Plaintiff's exhibit 19, E. 16 at 17, A. 275.

[84] A. 584.

[85] *E.g.* Kardon v. National Gypsum Co., 73 F. Supp. 798 (E. D. Penn, 1947). In Tcherepnin v. Knight, 389 U.S. 332 (1967) this Court took note of the legislative history of the Securities Act of 1933, adopted by

exemption for banking transactions was cited, and indeed there is none.[86]

The Court of Appeals holding has the potential of creating havoc in the Exchange Act's system of regulations, for regular brokers dealing in securities over the counter, as Gale and Haslem did herein, are subject to careful regulations which were directed by Congress specifically to prevent circumvention of the regulatory provisions governing formal stock exchanges.[87] These regulations declare it to be a "manipulative, deceptive, or other fraudulent device or contrivance" to engage in many of the practices employed by Gale and Haslem, such as failing to advise whether the broker is acting as agent for the buyer, the name of the person who was the purchaser, and other pertinent information.[88] The Court of Appeals decision, which denies application of the same rules to an unregistered broker under section 10(b) as would apply to a registered broker under section 15(c)(1), creates an avenue for the avoidance of the anti-fraud provisions concerning over the counter trading by the simple expedient of conducting business through an employee of a banking institution.

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the same legislative session which enacted the Exchange Act, where representatives of the savings and loan industry acknowledged that they *should* be subject to the anti-fraud provisions, but urged that they not be subject to other regulatory provisions. The Court of Appeals effectively turned that history about.

[86] This court has determined that basic banking transactions may be "securities" subject to Exchange Act regulations by definition. Tcherepnin v. Knight, 389 U.S. 332 (1967). *See also* Carroll v. First National Bank, 413 F.2d 353 (7th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970). *See also* decisions dealing with insurance contracts having a securities feature. SEC v. National Securities, Inc., 393 U.S. 453 (1969); SEC v. United Benefit Life Insurance Co., 387 U.S. 202 (1967); SEC v. Variable Annuity Life Insurance Co., 359 U.S. 65 (1959).

[87] *See* H. R. Rep. No. 1383, 73rd Cong. 2d Sess. 16 (1934): "The benefits that would accrue as the result of raising the standards of security exchanges might be nullified if the over-the-counter markets were left unregulated and uncontrolled. They are of vast proportions and they would serve as a refuge for any business that might seek to escape the discipline of the exchanges."

[88] 15 U.S.C. §78o (c) .1) (1964); 17 C.F.R. § 240.15c 1-4 (1971).

As this Court has indicated in a related context, the provisions of state law, including the state contract law which the Court of Appeals alluded to, give legal form to the transaction in question, but it is the federal statute which must be looked to in determining the obligation of the parties. In other words, the contract may determine if the Bank and its officers were fiduciaries and if they were that fact may relieve the plaintiffs of certain elements of proof which might otherwise be required under the anti-fraud provisions. This Court treated such collateral legal relationships in that fashion in its important *Capital Gains*[89] case, which remains the most definitive treatment of the elements of a fraud action under the securities laws:

> Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. *Nor is it necessary in a suit against a fiduciary . . . to establish all the elements required in a suit against a party to an arm's length transaction. Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients.* (Emphasis added).

The lower federal courts have recognized that the meaning of the "directly or indirectly" language of the Rule may be amplified by other federal statutes[90] and that arrangements ancillary to the securities transactions, including rules of securities dealers associations[91] and stock exchange rules[92] may expand the

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[89] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963).

[90] Brennan v. Midwestern United Life Insurance Co., 417 F.2d 147 (7th Cir. 1969), *cert denied*, 397 U.S. 989 (1970).

[91] Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966) *cert. denied* 385 U.S. 817 (1966).

[92] Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir. 1969) *cert denied* 396 U.S. 838 (1970). *Cf.* Silver v. New York Stock Exchange, 373 U.S. 341, 355 (1963); Pettit v. American Stock Exchange, 217 F. Supp. 21 (S.D.N.Y. 1963).

duties imposed under the securities laws. Violation of such collateral regulations, or even private arrangements, could and should be considered as an "act, practice, or course of business which operates or would operate as a fraud or deceit" within the meaning of the Rule.[93]

D. *The Court of Appeals Misapplied the Concepts of Reliance and Causation.*

The Court of Appeals held that reliance is "a basic element of a cause of this nature," as well as "proximate cause," which it said is "a simple and fundamental proposition" which the plaintiff must establish.[94] The trial judge's findings of reliance were, at the same time, rejected.[95] Thus, this Court must consider if reliance is as the Court of Appeals held, a fundamental element, and if it is, if reliance in the sense of direct, proximate, cause is necesary.

The appropriate limitation of liability under the Rule has been, and promises to continue to be, a constant battleground in the development of implied liabilities. In *J. I. Case Co. v Borak*[96] this Court announced what continues to be the guiding and frequently repeated principle that the Exchange Act must be interpreted broadly, to give effect to its broad remedial purposes. In the same tenor, leading commentators have sug-

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[93] Rules of stock exchanges and securities associations do have a semi-official flavor because they are sanctioned by other provisions of the Exchange Act and a distinction might be proposed on that basis. The agreement under which the Bank operated had the same quality of official status, however, since it bore the imprimatur of the Secretary pursuant to his assumed authority under the Termination Act.

[94] A. 586.

[95] The trial judge did not use the term "reliance" at any point in his findings, but he did rule as a matter of law that each and every element of the Rule was present. A. 536. Moreover, certain findings deal with fiduciary obligations and an "aura of responsibility" which actually go beyond mere reliance, A. 521, 533, and other findings, such as at A. 499-501, 516, 519-20, involve the elements of reliance as defined in non-disclosure cases. *See* List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1964) *cert. denied sub. nom.* List v. Lerner 382 U.S. 811 (1965).

[96] 377 U.S. 426 (1964).

gested that no elements may, therefore, be added by the courts to those prescribed by the Rule itself. See III Loss, SECURITIES REGULATION, 1764-65 (2d Ed. 1961):

> Literally all that the rule seems to require is proof of (1) some fraud or material misstatement (which, by construction, may be satisfied by the defendant's silence when he has a duty to speak) in connection with the purchase or sale of a security and (2) [jurisdictional elements]. Indeed, the plaintiff is not limited to proving an untrue statement or an omission but has recourse to the possibly broader 'fraud' language of the first and third clause of the rule. The other elements of common law deceit – reliance, causation and scienter – are not mentioned.

It is submitted, therefore, that in circumscribing the limits of liability under the Rule, due consideration should be given to the well understood meaning of the terms employed rather than to search beyond the Rule for new elements such as the Court of Appeals has done herein. This Court has never squarely addressed itself to the problem, but the dictum of *SEC v. Capital Gains Research Bureau, Inc.*[97] constitutes tacit approval of professor Loss' rationale.

The difficulty with the concept of reliance, particularly in the sense of proximate cause, is that these are concepts which are rarely susceptible of direct proof and frequently not susceptible of proof at all in a case such as this one involving nondisclosure and manipulation of the securities markets. Security holders, and in particular those of limited experience such as these Indian plaintiffs, necessarily rely upon the integrity of the market place.[98]

To put the matter in perspective, the trial judge held that the variegated misconduct of the Bank and its officers, much

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[97] 375 U.S. 180 (1963).

[98] Congress so recognized in adopting the securities laws. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

of which might not be considered fraudulent if viewed in isolation, produced a mass phychology among the terminated Ute's which induced them to sell in large numbers. These circumstances, when considered by the trial judge in relation to the Indians' lack of sophistication and the limited fiduciary relationship the bank and its officers had towards the Indians, indicated liability in all of the sales transactions, including the non-principal sales. The Court of Appeals rejected that view in favor of individual reliance and strict proximate causation (which may be difficult to prove even in the direct sales transactions) and said that the Indians lack of sophistication was not a circumstance which could be considered. Even a cursory look at the legislative history of the Exchange Act, which the Court of Appeals made no reference to at all, would have demonstrated that Congress shared the view of the trial judge.[99]

The Courts should neither be permitted nor required to balance the fault, as the Court of Appeals did when it criticized the Indians for "executing" false affidavits[100] examine intervening causation, or to "separate the mental urges,"[101] which would be necessary under the standards of reliance and proximate cause.

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[99] See H. R. Rep. No. 1383, 73rd Cong. 2d Sess. 6, 11 (1934):

> Speculation, manipulation, faulty credit control, *investors' ignorance, and disregard of trust relationships by those whom the law should regard as fiduciaries,* are all a single seamless web.
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> • • •
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> The deliberate introduction of a mob psychology into the speculative markets by the fanfare of organized manipulation menace the true functioning of the exchanges, upon which the economic well being of the whole country depends. (Emphasis added.)

[100] A. 583.

[101] "Neither the Commission nor the courts should be required 'to separate the mental urges,' Peterson v. Greenville, 373 U.S. 244, 248, 262 of an investment advisor for '[t]he motives of man are too complex . . . to separate . . .' Mosser v. Darrow, 341 U.S. 267, 271." SEC v. Capital Gains Research Bureau, Inc., 373 U.S. 180, 200-01 (1963).

Despite the logic of Professor Loss' reasoning, the majority[102] of courts have sallied beyond the precise language of the Rule, somewhat inconsistently, applying "the full panoply of common law fraud elements – misrepresentation or nondisclosure, materiality, scienter, intent to defraud, reliance and causation".[103] Yet if classic reliance is required, in the sense of "proximate cause," as the Court of Appeals held in this case, significantly different elements are thereby added to the rule, and the mere use of such terminology produces confusion. Some portions of the Rule, notably those employing fraud terminology, *could* be conditioned on a showing of reliance. Other por-

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[102] A respected minority of courts have given effect to Professor Loss' rationale. *See* Miller v. Bargain City, U.S.A., Inc., 229 F. Supp. 33, 37 (E.D. Pa. 1964): "In my judgment, it would be an unwarranted constriction of the broad protection contemplated by the federal scheme of securities legislation to engraft upon that scheme a requirement that is neither a part of the statute nor a part of the governing common law tort principles." To the same effect, see Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Matheson v. Armburst, 284 F.2d 670 (9th Cir. 1960) *cert. denied*, 365 U.S. 870 (1961); Errion v. Connell, 236 F.2d 447, 455 (9th Cir. 1956); Globus v. Law Research Service, Inc., 287 F.Supp. 188 (S.D.N.Y. 1968); Barlas v. Bear, Stearns & Co., CCH Fed. Sec. L. Rep. ¶ 91, 674 (N.D. Ill. 1966).

[103] Mitchell v. Texas Gulf Sulphur Co., ... F.2d ..... (10th Cir. April 26, 1971). Because of the obvious difficulty in appyling the reliance concept in its literal sense to fraud practiced in the market place, in particular, the courts have been forced to contortions of reasoning which do not lend the desired predictability in the legal standard. For example, the leading "reliance" authority is List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965), *cert denied sub. nom.* List v. Lerner, 382 U.S. 811 (1965). Yet, the Fashion Park case defined reliance in terms of whether "the misrepresentation is a substantial factor in determining the course of conduct" of the plaintiff or, in a case of non-disclosure, "whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact." The test of "materiality," on the other hand, which is an *express* element under the rule, is whether "in reasonable and objective contemplation [the fact] might affect the value of the corporations stock or securities." Chasins v. Smith, Barney & Co., Inc., ... F.2d ..... (2d Cir. 1971) quoting from SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969). See also Ecott v. BarChris Construction Corp., 283 F. Supp. 643, 681 (S.D.N.Y. 1968). See footnote 109, *infra.*

tions of the Rule, particularly those dealing with half-truths or nondisclosure, seem ill-suited to such a showing at all. The task confronting this Court is to determine if reliance *should* be required in *any* private actions under the Rule. That question should be resolved in light of the fundamental objectives of the Rule, which were not examined by the Court of Appeals.

Had Congress intended that a showing of reliance be required in a cause of action under section 10(b) of the Exchange Act, it knew how to express that intent, and did so in other provisions of the securities laws.[104] The legislative history of the Exchange Act indicates that it was intended that any person who is in fact affected by manipulative or fraudulent practices should be allowed to recover his damages, but no mention is made of a "reliance" or "proximate cause" standard in this connection.[105] It seems clear, therefore that if Congress had causation in mind at all it intended nothing more than "but for"

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[104] Section 18 of the Exchange Act, 15 U.S.C. §78r (1964), contains a statutory requirement of a showing of reliance, as does section 11(a) of the Securities Act of 1933, 15 U.S.C. §77k (a) (1964). Rule 10b-5 was, of course, promulgated by the United States Securities and Exchange Commission, but section 10 of the Exchange Act, which is the enabling provision, contains the basic fraud language without reference to "reliance." Moreover, the Rule has a counterpart in section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q (a) (1964), containing substantially identical language which may fairly be said to express the intent of Congress on the elements of the Rule proper. Section 17(a) also contains no reference to "reliance."

[105] *See* H. R. Rep. No. 1383, 73rd Cong. 2d Sess. 11 (1934) "To make effective the prohibitions against manipulation civil redress is given to those able to prove actual damages from any of the prohibited practices." See also Minority report, H. R. Rep. No. 1383, 73rd Cong. 2d Sess. 31 (1934), where an objection was voiced because a suit for damages for misrepresentation is available to "anyone who suffers." Compare the comments dealing with actions under section 9 of the Exchange Act, 15 U.S.C. §78i (1964), where it was indicated that "in such case the burden is on the plaintiff to show the violation or the fact that the statement was false or misleading, and that he relied thereon to his damage." Sen. Rep. No. 792, 73rd Cong. 2d Sess. 13 (1934). Such a requirement is consistent with the language of section 9, which refers to "*inducing* the purchase or sale" throughout. No comparable language was inserted in section 10.

causation, which would be consistent with its intent to ban *all* false, deceptive or manipulative practices in connection with *any* securities transaction. Moreover the integrity of the market place, which the Exchange Act was fundamentally concerned with, is not promoted by allowing one whose fraud has already been established to set up an additional defense on the theory that the plaintiff *may* have been imprudent or otherwise suffered his loss even if the defendant had not committed fraud.

Analogy to the law developed in cases involving intersection collisions, where the concepts invoked by the Court of Appeals have come into full flower and where balancing of fault does serve public policy, seems inappropriate when dealing with Congressional enactments designed to eliminate *all* deceptive practices from the securities markets. It may be true, as the Court of Appeals evidently concluded, that the Indians' loss was in large measure a result of their own improvidence, but lack of sophistication or improvidence are not conditions declared to be against public policy under the Rule —the deceptive practices of the defendants are.

In deceit cases most similar to the matter at bar, in which the privity of contract required by the Court of Appeals was not present, liability was imposed *if the plaintiff was among the class of persons to whom the misstatement was directed.*[106] In *Peek v. Gurney*[107] that standard, which is a qualified version

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[106] Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789). Importing the common law practice of circumscribing liability in terms of those to whom the misrepresentation was intended for, has logic to commend it — at least in cases based upon misrepresentation rather than omission—in view of the use of the term deceit in the rule. That concept was, after all, a part of the law of deceit which the rule seems to adopt. But, it has been urged that even that limitation is unduly restrictive and that all persons who could reasonably be expected by the defendant to rely upon the misrepresentation should be allowed to recover. See Comment, 4 STAN. L. REV. 308 (1952).

[107] 43 L. J. (n.s.) 19 (1873). Liability was not imposed in Peek v. Gurney because the purchaser in a secondary market transaction was not

of the "but for" causation petitioners urge to the Court, was applied to stock transactions in the anonymous setting of the market place. Haslem, Gale and the Bank, whose conduct was obviously intended to influence the entire group of Indian shareholders, should be held to at least as high a standard of liability as was imposed at common law.

These considerations have caused as able a judge as the late Jerome N. Frank to conclude that it is improper for the courts to impose restrictions under the Rule which neither Congress nor the Commission have considered "necessary or appropriate."[108] SEC has reached the same conclusion in *amicus*

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within the class of persons that the misstatements, contained in an offering circular, were directed to. Lord Chelmsford indicated, however, that Scott v. Dickenson, 29 Law J. Rep. (n.s.) Ex. 62, in which a false prospectus was left at a bank for the consumption of the general public was an appropriate case for liability of the directors to members of the public who were injured, despite the absence of privity. For an excellent contemporaneous analysis of Peek v. Gurney, *see* Thompson, *Liability of Directors for Deceit*, 22 CEN9 L. J. 81, 90-92 (1886).

[108] *See* the dissent of Frank J., in Joseph v. Farnsworth Radio and Television Corp., 198 F.2d 883, 884 (2d Cir. 1952).

[109] *See* Memorandum For SEC, Amicus Curiae, On Petition For A Writ of Certiorari in List v. Lerner, Docket No. 66 (October Term, 1965) at pages 7-8:

> "Framing the test in terms of 'reliance,' however, is not particularly helpful when dealing with a case of complete non-disclosure. For it is difficult to see how a seller fairly can be said to have 'relied' upon something he never even knew about, and this analysis leads to such confusing concepts . . . as 'the negative of the fact undisclosed.' The appropriate inquiry, we believe, is whether the non-disclosure by the buyer caused injury to the seller.
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> "The court of appeals enunciated the test as 'whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact' . . . In a case where the transaction was personally negotiated between the parties, this may be an appropriate basis for determining whether the seller was injured by the non-disclosure. But it would seem too restrictive a standard in situations where the element of personal negotiation was lacking and the purchases were routing transactions on a securities exchange or in over-the-counter market. If, for example, an insider, upon receiving information which, if made public, foreseeably would cause the market place price of his company's stock to double, buys such

briefs filed with this Court, in which it has rejected reliance as a proper test and said that "the appropriate inquiry . . . is whether the non-disclosure by the buyer *caused* injury to the seller." [109] Since this case is first impression in this Court on the elements of an action under Rule 10b-5, we urge that the well reasoned analyses of Judge Frank, SEC, and Professor Loss, though perhaps a minority at least with reference to the particular element of reliance, should be carefully considered. It should also be considered if the responsible and obviously calculated dictum of *Capital Gains*, where this Court stressed that in private damage actions it is only necessary to show that the defendant "*intended* that action be taken in reliance," [110] and more recently in *Mills v. Electric Auto-Lite*, [111] where it was suggested that the elements of causation and reliance are not appropriate to an action under section 14(a) of the Exchange Act, do not represent the adoption of the "but for" rationale.

II

THE UNITED STATES WAS NEGLIGENT IN IMPLEMENTING THE TERMINATION ACT.

A. *Statement.*

The obligation of the United States in implementing the Termination Act is an important question to all Indians every-

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stock before the information is disclosed, those who sell to him at the lower price are damaged, even though they still might have sold had the information been public. See, e.g., *Cady, Roberts & Co.*, 40 S.E.C. 907. For in that case they would have received twice as much. In any realistic sense, therefore, they were injured by the buyer's non-disclosure, and should be permitted to recover."

[110] 375 U.S. 180, 192n. 39. *See* footnote 59 and related text.

[111] 396 U.S. 375, 382n. 5 (1970). "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress, if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Id.* at 385.

where. If Congress directs that minerals and judgment claims shall be held subject to the restriction and supervision of the United States, and that they not be partioned to corporations, may BIA circumvent those provisions by delivering the *proceeds* from the mineral estate to a corporation? When Congress directs that management rights (as distinguished from beneficial title) be held in common and exercised under a "constitution and bylaws" adopted by a majority of the adult Indians in a special election called by the Secretary, may BIA substitute a corporate charter adopted by five Indians and "accepted" by an insignificant minority? If Congress directs that action taken by the general membership of the Indians will no longer be binding upon the terminated Utes after "such approved organization is effected," may BIA bypass the approved organization when it suits its convenience and dispose of valuable property rights in public meetings?

When Congress directs protective provisions for the "members of the tribe," may BIA officials deny the protections to the individual member and shift it to a corporate entity—the Tribe?

B. *Both The Termination Act and 25 U.S.C. §345 Must Be Construed In a Manner Affording Maximum Protection to the Indian.*

Since the time of Chief Justice Marshall, this Court has been unyielding in its insistance that Indian laws be construed in the manner most favorable to the Indian,[112] as a protection for his property. *E.g. Choate v. Trapp*:[113]

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a

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[112] *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 172 (1971). Accord, Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968); United States v. Hellard, 322 U.S. 363 (1944); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

[113] 224 U.S. 665, 675 (1912).

> weak and defenseless people . . . In view of the universality of this rule [legislation] should be liberally construed in their favor . . . .

With particular reference to restricted property such as the mineral estate, until the restriction against alienation is removed *in the manner provided by law*, the presumptions of Indian law continue even though the wardship relation of the person may have been dissolved,[114] as it was in this case on publication of the "termination proclamation."

1. As regards Termination Legislation.

The policy of liberal construction has been applied by this Court to companion termination laws.[115] By adopting a strict construction *against* the interest of the terminated Utes, and indulging in the presumption that BIA by its mere acquiesciance could effect a transfer of the powers of authorized representative from AUC to UDC, the Court of Appeals reversed this historic policy. Whatever their merits in other contexts, such presumptions have never been countenanced as a device to divest Indian rights,[116] and it has been consistently held that BIA may not administratively alter the policies of Congress.[117]

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[114] F. COHEN, *supra* note 112, quoting from United States v. Nez Perce County, 267 Fed. 495, 497-98 (D. Idaho 1917).

[115] Menominee Tribe v. United States, 391 U.S. 404 (1968).

[116] *E.g.* Ballinger v. Frost, 216 U.S. 240, 249 (1910):

> Whenever, in pursuance of the legislation of Congress, rights [of an Indian] have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.

[117] United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1947) *cert. denied* 331 U.S. 842 (1947): "In his dealings with the Indians, the Secretary of Interior does not have the power of an Asiatic potentate or even of a benevolent despot. He like his wards themselves, is subject to legislative restrictions." *See also* United States v. Hellard, 322U .S. 363, 368 (1944); Mullen v. Simmons, 234 U.S. 192 (1914); Starr v. Long Jim, 227 U.S. 613 (1913).

The Court of Appeals' reading of the language of the Termination Act declaring that after termination of the person "the laws of the several states shall apply to such member in the same manner as they apply to other citizens," [118] as meaning that the public could deal with the Indians' restricted property at arms length also represents a reversal of the traditional policy. This Court has consistently said that if a purchase of restricted property is made in violation of the procedures prescribed by Congress the sale may be set aside and the Indian need not make restitution.[119] "This result may be harsh to the [defendants] but as Justice Holmes once said, people must turn square corners when they deal with their government. They must do the same when dealing with their government's wards." [120]

The trial judge disregarded these firmly established policies and required that the "fair value" of the consideration received by such plaintiff [121] be deducted from the damages awarded. Since there was no evidence of the value of the miscellaneous chattels given to the Indian, the amount recited in the fictitious affidavits was taken as the fair value. This holding represents a substantial injustice, which strikes at fundamental Indian policy, and should be reversed.[122]

2. As Regards Jurisdiction.

If the terminated Utes "[have] an undivided 27 per cent beneficial interest in the oil, gas and minerals" as the Court

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[118] Section 23, 25 U.S.C. §677v (1964), App. xvi.

[119] Heckman v. United States, 224 U.S. 413, 446-47 (1912). "The effectiveness of the acts of Congress concerning the Indian's thriftlessness is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that . . . the purchase price [be] repaid, and thus frustrate the policy of the statute." *See also* United States v. Trinidad Coal and Coking Co., 137 U.S. 160 (1890).

[120] Bacher v. Patencio, 232 F. Supp. 939, 941 (S.D. Cal. 1964) *aff'd per curiam*, 368 F.2d 1010 (9th Cir. 1966).

[121] A. 537.

[122] This Court read identical provisions in companion legislation as meaning only that federal *statutes* no longer apply. Menominee Tribe v. United States, 391 U.S. 404 (1968).

of Appeals acknowledged,[123] this Court must confront the question of whether the federal courts have jurisdiction to grant the requested relief.[124] The Court of Appeals held that they do not.[125]

AUC relied primarily on the language of 25 U.S.C. §345:

> All persons[126] who are in whole or in part of Indian blood or descent . . . who claim to have been unlawfully denied or excluded from . . . any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States . . .

The policy of liberal construction of Indian laws applies to jurisdictional questions,[127] but the Court of Appeals gave the statute a narrow reading and held that it was confined to jurisdiction over "allotments" of the conventional variety. The holding, in logic, must be in error for if the Termination Act vested the Indians with equitable title, they are "lawfully entitled by virtue of any Act of Congress," at least with respect to beneficial title.

The Court of Appeals also held that the Termination Act's grant of individual interests in the minerals, whether characterized as legal title or a mere beneficial interest, could not be considered an "allotment" for the purpose of 25 U.S.C. § 345. Congress evidently considered the terminated Ute's interests to be

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[123] A. 588.

[124] A. 539. The Court of Appeals attempted to emasculate the AUC complaint with its declaration that "It is not an issue in this case as to what organization on behalf of the mixed-blood group has the right of management, and we do not so decide." A. 588.

[125] A. 588.

[126] AUC filed suit on behalf of all of its Indian members pursuant to the right conferred by statute to act "for their common welfare." Section 6, 25 U.S.C. §677e (1964), App. iii.

[127] McKay v. Kalyton, 204 U.S. 458, 469 (1907). *Cf.* United States v. Hellard, 322 U.S. 363 (1944).

very much like an allotment, however, and even called them "allotments" at one point.[128] Moreover, this Court has rejected the argument that a grant of mere beneficial rights cannot be determined under 25 U.S.C. §345:

> The suggestion . . . that the controversy here presented involved the mere possession and not the title to the allotted land is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the alloted lands.[129]

The same reasoning should apply to the portions of the statute dealing with a claim to entitlement under an Act of Congress.

The courts have given 25 U.S.C. §345 a similarly liberal reading in other context. Thus, in *Gerard v. United States*,[130] effect was given to *both* types of actions contemplated by the statute, *viz*: "provisions (a) where an Indian is seeking to establish his 'right . . . to any allotment' and provisions (b), where he is seeking to protect his interest in 'land' to which he is entitled 'under any grant made by Congress.'" Very recently, in *Scholder v. United States*,[131] it was held that the section could

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[128] *See* section 13, 25 U.S.C. §677*l* (2) (1964) at App. x: "The value of improvements made . . . shall be excluded from the valuation in making allotments . . ." The term "allotment" has also been read liberally by this Court. In United States v. Jackson, 280 U.S. 183, 196 (1930) it was held that the Indian Homestead Act of June 4, 1884, must be considered *in pari materia* with the General Allotment Act of February 8, 1887, along with any other statutes "evidencing a continuous purpose on the part of Congress" to eliminate the wardship relation between the Indian and the United States and the substitution of personal property ownership. The termination acts are the last in a line of statutes dealing with this common purpose. *Cf.* Menominee Tribe v. United States, 391 U.S. 404 (1968); Toss Weaxta, 47 L.D. 574 (1920).

[129] McKay v. Kalyton, 204 U.S. 458, 469 (1907).

[130] 167 F.2d 951 (9th Cir. 1948). *See also* Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904), where the Section was used to obtain a declaration of an Indians status under an Act of Congress, where no allotment was yet selected; Halbert v. United States, 283 U.S. 753 (1931); Arenas v. United States, 322 U.S. 419 (1944).

[131] 428 F.2d 1123 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

be used to challenge construction charges for irrigation projects under contracts merely collateral to an Indian allotment.

The proper limits of the jurisdictional statute, therefore, are not along the formalistic lines of whether a particular grant is denominated an "allotment," but are as explained in *United States v. Pierce*.[132] That is, the statute may not be used to substitute the courts' judgment for that of Congress in questions of Indian land policy. But Congress *has* declared the policy under the Termination Act, and the statute refers to a "claim" to which an Indian is "lawfully entitled by virtue of *any* Act of Congress."

C. *AUC is the Only Proper "Authorized Representative."*

The initial formation of AUC as authorized representative is recited in the statement of the case and is not in dispute. The question, rather, is whether AUC's rights were properly shifted to UDC. The Court of Appeals asserted that "the termination statute . . . permitted the mixed-blood group to form associations *or corporations* to handle some of the property difficult or impossible to distribute" and that UDC was thus formed to "handle" the minerals and to act as "authorized representative."[133] The Termination Act did not, by its terms, permit the terminated Utes to form associations *or corporations* to handle the minerals and act as authorized representative – it provided for an unincorported association *only*.

In an apparent effort to justify BIA's action in substituting UDC as authorized representative, it was observed that "the Secretary of Interior *acquiesced* in the formation of the corporation," which must be measured against the policy of liberal construction of Indian laws. No statutory authority for such acquiescance was cited, and indeed there is none. To the con-

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[132] 235 F.2d 885 888 (9th Cir. 1956). See also Segundo v. United States, 123 F. Supp. 554 (S.D. Cal. 1954). *Cf.* Pinto v. Tampo Largo, 205 F. Supp. 129 (S.D. Cal., 1962).

[133] A. 576, 578, 588.

trary, the Termination Act implied, at least, that such a corporation could not be formed in at least three places:

1. Section 13(2)[134] provides for the "partition of the lands of the mixed-blood group, *excepting all gas, oil and mineral rights*, to corporations . . ."

2. Section 6,[135] provides that the authorized representative is to be designated by a "constitution and bylaws."

3. Section 13(3)[136] provides that corporations may be organized for the grazing of livestock and the handling of water and water rights. Handling of mineral rights or acting as "authorized representative" are not mentioned.

The defects in the organization of UDC, moreover, are fundamental. Congress plainly declared in section 6 that the following procedures must be followed in the formation of the authorized representative.

(a) The authorized representative must be formed pursuant to a constitution and bylaws.

(b) A majority of adult terminated Utes must approve the constitution and bylaws.

(c) The approval by the terminated Utes must be "at a special election authorized and called by the Secretary."

UDC did not conform with *any* of these prerequisites.

More basic still, on November 1, 1958, when a small group of Indians purported to "accept" the UDC articles,[137] there was no statutory authority to take any action respecting the

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[134] 25 U.S.C. §677*l* (2) (1964), App. x.

[135] 25 U.S.C. §677e (1964), App. iii. The pertinent language of the section reads: "The mixed-blood members of the tribe . . . may adopt an appropriate constitution and bylaws . . . Such constitution may provide for the selection of authorized representatives. . . ."

[136] 25 U.S.C. §677*l* (3) (1964), App. xi.

[137] *See* footnote 9, *supra*.

authorized representative in a general membership meeting. That conclusion also follows from the language of section 6, which declares that "in the event no such approved organization is effected" the terminated Utes could act in a general membership meeting. Plainly, an approved organized *had* been effected upon the formation of AUC in 1956, thus superseding the provisions of section 6 concerning action at a general membership meeting.

These technical matters of construction should not be resolved in a vacuum, but should be considered in light of the purpose of the Termination Act. The construction proposed suits the Congressional purpose in several ways.

First, the basic policy of the Act was to substitute individual rights for community or tribal rights.[138] Once the "approved organization" was effected all rights, whether legal or beneficial, vested subject only to supervision by the Secretary during the ten year transitional period. Thereafter, the individual Indian was no more subject to having his property disposed of jointly, by majority vote in a public meeting, than would any other citizen at a public gathering of his neighbors.

Second, Congress recognized that the terminated Utes' business experience was limited in several different provisions,[139] including the provision for a constitution and bylaws to deal with the minerals. Congress presumably understood the restrictions on alienability under a constitution and bylaws, as opposed to a corporate charter, and intended it as a protection for this property.[140]

Third, the authorized representative was to manage the beneficial interests of all Terminated Utes and to sit with the

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[138] *See* section 10, 25 U.S.C. §677i (1964), App. vi. *Cf.* section 8, 25 U.S.C. §677g (1964) at App. v.

[139] *See* section 22, 25 U.S.C. §677u (1964), App. xvi. That recognition is also implicit in the phased withdrawal of supervision.

[140] Contrast the provisions for a corporation to handle tangible rights, such as grazing and water, which the Indian would have less difficulty in dealing with. See section 13(3), 25 U.S.C. §677*l* (3) (1964), App. xi.

tribal business committee as joint managers of an oil-rich region. If membership in the organization exercising these rights could be sold, shrewd whites, in the pattern of the past, might gain control or even dominate the Indians from a position of minority control. Worse, perhaps, is the prospect of non-Indians intruding into tribal affairs. The provision for a constitution and bylaws rather than a corporation seems designed to protect against these possibilities.

Fourth, the authorized representative was also invested with powers of management of "all unadjudicated or unliquidated claims against the United States." These claims are the product of special jurisdictional acts and special Indian Claims Commission jurisdiction. Surely Congress did not intend that whites could *purchase* an interest in beneficent acts designed to compensate for social injustices of the past.[141]

The action of BIA in substituting UDC for the institutions and policies prescribed by Congress may have been in complete good faith. It was, nevertheless, in disregard of Congress' directive, and a substantial act of negligence.[142] If the deviations from the requirements of the Termination Act are sanctioned the way will be opened to high handed administrators who would deal in an autocratic fashion with property of their Indian wards.[143]

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[141] Some purchasers considered that they were doing exactly that. *See* exhibit 64D, E. 85, A. 450.

[142] The trial judge so recognized, with his conclusions that the Secretary had a duty "to see that the statute governing transfers was observed in substance as well as in form," A. 532 that "it rested with Congress to determined when the guardianship relationship between the government and the mixed-blood ceased and when and how termination should be effected;" A. 533 and that to the extent that the government undertook to perform functions not directed by the Termination Act it "had the duty to exercise reasonable care in connection therewith." A. 533.

[143] *See generally*, V. DELORIA, JR., CUSTER DIED FOR YOUR SINS, (1969).

D. *The Neglect of BIA in Requiring Compliance With the Regulations.*

Rightly or wrongly, UDC was formed. The Secretary did promulgate regulations concerning the sale of its stock. The principal findings of the trial judge concerning the negligence of the United States centered on BIA's failure to require compliance with the regulations thus adopted.

1. Failure to Require Compliance with the Sales Procedure.

A general description of the sales procedure is contained in the statement of the case. Specifically, the restrictions imposed were those Congress prescribed in 25 U.S.C. §677n in the case of a sale of real property, which the Secretary incorporated in the regulations and the articles of incorporation of UDC[144] and its stock certificates.[145] The requirements were:

(1) The filing, by the Indian, of an "offer to sell" the UDC shares to the "members of the tribe," specifying a sum in cash, on forms prepared by the BIA.[146]

(2) Posting by the Superintendent of the offer to sell at various public places in the vicinity of the reservation.[147]

(3) Advise to the Indian, by means of a "notification"[148] prepared by the Superintendent, that no offer had been received, and that the shares could be sold at the same or a greater price, and on the same terms and conditions, within a six months period of time.

(4) Endorsement by the Indian of the certificate itself.[149]

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[144] Exhibit 16A, E. 1 at 6.
[145] Exhibit 101, E. 107, A. 28.
[146] Exhibit 50, E. 41, and the BIA's "Instructions" accompanying the form at E. 44-45, A. 207.
[147] *Id.*
[148] *Id.* at E. 37.
[149] The certificate, Ex. 101 at E. 106, A. 28, provided on its face that the stock was "transferable only . . . upon surrender of this Certificate properly endorsed." *See* also 25 C.F.R. § 243.12 (1962) (deleted 1969), App. xx, incorporating all restrictions printed on the stock certificate.

(5) Determination by the Superintendent that the sale was on the "same terms and conditions" as the offer filed with the Superintendent.[150]

(6) Certification of the Superintendent *to be furnished to the purchaser,*[151] and endorsed *on the stock certificate itself* "that a prior and proper offer has been made . . . in accordance with law and regulations."[152]

No transfer of UDC stock in the entire history of the Termination Act was accomplished in the specified manner. Never did the Superintendent require that a single sale be on the "same terms and conditions" – *i.e., cash,* 10% deposited on acceptance of the offer and the balance paid to the superintndent within 30 days by certified check, bank draft or postal money order.[153] The Superintendent never required endorsement of the certificate, but accepted a separate stock power—a practice inaugurated to suit the convenience of the Bank, rather than protect the Indian. The Superintendent's certificate was never furnished to the purchaser, but in all cases was furnished to the Bank.

Whether these deviations were in good faith or in disregard of the Indians' rights is unimportant. In either event, they proximately caused the Indian's loss because if the Superin-

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[150] *See* UDC Articles, Article VIII at E. 6, 25 C.F.R. § 243.8 (1962) (deleted 1969) App. xx and the forms promulgated by the BIA, E. 37 41, 44 and 46, A. 207.

[151] *See* 25 C.F.R. § 243.8 (1962) (deleted 1969), App. xvii.

[152] *See* the legend on the reverse of the stock certificate at E. 107. Article VIII of the UDC articles at E. 6, and 25 C.F.R. § 243.12 (1962) (deleted 1969) at App. xx. *See also* the Banks letter in connection with the first attempted transfer, in which this limitation was recognized, Exhibit 44, E. 28, A. 285.

[153] These are the terms of the offer. *See* Exhibit 50, E. 41, A. 207. The Superintendent never received the payments for any Indian. *See* UDC minutes for September 10, 1963, E. 58, 59, A. 330. The acting Superintendent and the Realty Officer were both in attendance. In paragraphs nos. 4 and 7 the sales procedure was discussed and they were advised that the Indians were getting used cars rather than the cash stipulated.

tendent had required strict compliance with the procedures the fraud of others would have been most unlikely, and perhaps impossible. The stock certificates had warnings spread all over them designed to protect the Indian, but not a single Indian ever saw the warnings before August 27, 1964 because the certificates were withheld by the Bank. If the Superintendent had required compliance with the regulations, every Indian would have been required to see the warnings. The group hysteria which pervaded the reservation in 1963-64, which caused most Indians to sell, may very well have been prevented, but even if it was not the Indians would have at least been assured that they received their money. The requirement that the certificate be furnished *to the purchaser* may seem unimportant on the surface, but if it had been enforced the Superintendent would have been in personal contact with each and every purchaser. His task of verifying the regularity of transactions, in that event, would have been more effective. More importantly perhaps, the enforcement of that condition would have rendered the brokerage activities of Gale and Haslem most unlikely.

2. Failure to Preserve the Terminated Utes Rights as "Members of the Tribe."

The Termination Act created a "right of refusal" in the "members of the tribe" [154] as to all sales of real property prior to August 27, 1964, and the Secretary's regulations extended that right to the stock sales. The Court of Appeals nullified these protections, however, by holding that when Congress and the Secretary said "members of the tribe" they meant to say "Tribe," and further, meant to exclude the "members" from the exercise of that privilege.

The implications are profound and their importance should not be ignored. It may be true, as the Association on American

[154] *See* section 15 of the Termination Act, 25 U.S.C. §677n. (1964). App. xii, 25 C.F.R. §243.2 (c) (1962) (deleted 1969), App. xviii.

Indian Affairs, Inc., *amicus curiae*, has said, that the retention of the minerals by the United States is reason enough to find a duty, but that does not diminish the importance of this question. The problem here is over *express* rights *contained in the statute*. If BIA, or the Courts, can divest the individual Indian of protections devised by Congress, Indian rights throughout the Nation will be unsettled.[155]

The Court of Appeals never disputed that the sales procedure was aborted by pure inaction of the Superintendent, but vindicated the United States by holding that the terminated Utes "had no rights under the right of refusal" — ergo, no duty and no liability. The anachronistic position was thus adopted that, under legislation whose dominant objective was the adjustment of the condition of the terminated Utes, the terminated Utes themselves had utterly no rights.

In reaching that conclusion, the Court of Appeals relied entirely on its own recently issued opinion in *Ute Indian Tribe v. Probst*,[156] which was unfortunately rendered on a record virtually devoid of evidence concerning the meaning of "members of the tribe." The Court in *Probst* even noted that "we are aware of no legislative history which illuminates the intent

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[155] *See* Menominee Tribe v. United States, 388 F.2d 998 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968); Crain v. First National Bank, 324 F.2d 532 (9th Cir. 1963) (Indian status survives termination of the person). Possibly the best example of the purpose of the Termination Act to protect the individual terminated Ute, and the total abandonment by BIA of any effort to accomplish that objective, is in relation to section 22, 25 U.S.C. §677u (1964), App. xvi. Though Congress declared that the Secretary was to protect the rights of members of the tribe who were "non compos mentis, or, in the opinion of the Secretary, *in need of assistance in conducting their affairs*," (emphasis added), the BIA read the provision as if it said incompetent *only*. A. 205. Thus, persons whose need of assistance was painfully apparent, such as Mrs. Hendricks who "spent $6,000.00 for 200 sheep" and reported that "she lost her sheep and did not know what became of them." A. 486, were given no assistance whatever because they were not technically incompetent. The need of virtually every terminated Ute for "assistance" was determined by elaborate social workers files compiled on every terminated Ute. Significantly, no files were compiled on the full-bloods.

[156] 428 F.2d 491 (10th Cir. 1970) *cert. denied* 400 U.S. 926 (1970).

of the first refusal provisions," though there is in fact an abundance of such evidence contained in the record in this case. In fact, AUC even requested leave to appear *amicus curiae* in *Probst* to advise the Court of Appeals of the legislative history and other evidence indicating that its *Probst* decision was in error, but the request was denied. The Court of Appeals reliance on *Probst* under these circumstances, is an unwarranted extension of the doctine *stare decisis* and this Court should now consider the evidence on the meaning of "member of the tribe" which was ignored below, in the interest of justice to the individual Indian.

The plain meaning of the words "members of the tribe" used in the statute includes the individual Indian, but if there could be any doubt it was removed by the regulations: " 'Member of the Tribe' means all mixed-blood and full-blood members as defined in (a) and (b) of this section." [157] More conclusive still, the Solicitor for the Department of Interior issued a formal legal opinion in 1956 to the effect that "members of the tribe" meant the terminated Utes.[158]

The *Probst* court misunderstood two letters of Assistant Secretaries in 1961 [159] which concluded that the term "members of the tribe" *includes* the Tribe itself. The Court of Appeals took that argument one step further, and held that because it *includes* the Tribe it must also *exclude* the Tribe's members, which has the effect of reading certain provisions out of the regulations.[160] Fortunately, the events leading up to the two letters *Probst* relied on are in evidence in this case and give them a quite different meaning when read in historical context.

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[157] 25 C.F.R. § 243.2 (c) (1962) (deleted 1969) App xviii. By contrast, 25 C.F.R. § 243.2 (f) contains a separate definition for "Tribe."

[158] Plaintiffs exhibit 41, E. 23.

[159] One of the two letters appears as exhibit 42A, R. 1523.

[160] For example, the competitive bidding provisions of 25 C.F.R. §243.7 (1962) (deleted 1969), App. xix. If the Tribe had exclusive rights, as the Court of Appeals said, there could never be more than one acceptance.

After the Secretary's legal opinion construing "member of the tribe," it was assumed that only the *members*, and *not* the Tribe, could take advantage of the first refusal option. That presented a problem when the terminated Utes were selling their interest in two range corporations specifically authorized by section 13(3) of the Termination Act, for the only potential buyer large enough to purchase the entire range at its appraised value was the Tribe. Thus, AUC actually *requested*, in the interest of its own members, that an *exception* be made to permit the Tribe to purchase.[161] Exhibit 37 (E. 21,) is the telegram confirming what was in fact a change in policy, justified on the basis that the individual members could act collectively through the Tribe. The two letters relied upon in *Probst* merely echoed the conclusion of the telegram, and were clearly misread when they were considered out of context.

Additional legislative history, also not available in *Probst*, is contained in exhibits 33 and 34 (R. 1492, 1501), which are legislative history of an amendment to the provisions of the Termination Act containing the first refusal option. These documents make clear that the purpose of the amendment was to prevent improved alienation *by the Indian*. No mention is made of the Tribe.

In the face of this volume of evidence on Congressional intent, contemporaneous construction and legal precedent, the Court of Appeals nevertheless held that the "the shareholder who was here proposing to sell his stock cannot be considered to be within the group in which the right vested." A. 580. In effect, the Court of Appeals has declared that the Secretary had both the right and the duty to regulate the terminated Utes, but no obligation to exercise due care in doing so. That holding is serious error which should be reversed.

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[161] *See* page 24 of defendants exhibit 29, R.1436 at 1440, which is the history BIA compiled of its administration of the Termination Act:

At the request of the Tribal Business Committee of the Ute

III

APPROPRIATE RELIEF SHOULD BE DEVISED

The trial judge recognized that UDC was unique, for it owned no assets, engaged in no business other than as authorized representative, and was a mere "conduit" through which the terminated Utes share of the proceeds from the minerals and judgment claims were paid.[162] The Indians who sold, on the other hand, were unaware of the potential value of the stock[163] and did not even have the benefit of the red letter warnings which might have alerted them to its potential value. Non-Indian buyers and sellers, many of whom were no better informed than the Indians themselves, were in turn "materially and substantially affected [in] the offer and sell prices" by the fraudulent market making activities of Gale and Haslem.[164]

The Indians, in their uninformed condition and subject to the other disadvantages determined by the trial judge, were induced to sell stock representing assets valued by plaintiffs experts at in excess of $28,000 per share.[165] At the same time,

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Indian Tribe *and the Board of Directors of the Affiliated Ute Citizens* approval was given by the Bureau whereby the Ute Tribe could purchase the stock certificates from the mixed-blood members in accordance with section 15 of the 1954 Act and as further detailed in the Secretary's regulations." (emphasis added) *See also* plaintiffs exhibit 42-B, E. 25, A. 217. Of the nine forms used, appearing at exhibit 50, E. 37-46. A. 229, only one (the notification at E. 37) so much as mentions the Tribe.

[162] A. 528.

[163] A. 527.

[164] A. 522.

[165] The Reservation sits on top of one of the richest known mineral structures in the world. A. 352, 356. The mineral of primary value is oil shale, containing 110,440,000 barrells of recoverable oil, A. 357-66, 404, but it also contains oil and gas A. 353, 382 and coal A. 354, 384 in known quantities, plus an assortment of other minerals the amount of which is unknown. A. 352, 378, 384. Plaintiffs witnesses Christiansen and Hamilton both testified concerning the market value of these resources, based

the trial judge considered that damages computed on the basis of asset value "would be incongruous with the situation of numerous mixed bloods who have retained their stock," because the possibly imprudent Indians who sold would realize values immediately which their more prudent brothers who did not sell must wait a long period of time to obtain, and elected instead to fashion a remedy taking varying account of all of these factors.[166] An assumed fair value — fair, it must be observed, with reference to those who did not sell rather than those who did—of $1500 per share was adopted.

The trial judge's approach was basically sound,[167] at least as far as it went:

upon actual sales transactions in 1963-64. A. 368-70, 406. Based upon Dr. Christiansen's estimates, which were the more conservative of the two, the actual value of the mineral assets is as follows:

Mineral	Value of total deposits underlying the Reservation	Terminated Ute's share (Col. 2 multiplied by 27.16186%)	Value per share (Col. 3 divided by 4,900)
Oil & Gas	$ 50,136,000.00	$ 13,621,249.30	$ 2,779.88
Coal	57,287,991.00	15,564,344.85	3,176.40
Oil Shale	414,150,000.00	112,518,756.90	22,963.01
Dawsonite	Present but not established	Great Potential	0
Nahcolite (trona)	Present but not established	Great Potential	0
Gilsnoite	Present but not established	Great Potential	0
TOTALS	$521,573,991.00	$141,704,351.05	$28,919.29

[166] A. 530. See also the trial judge's comments at A. 572.

[167] *See*, generally, Story Parchment Co. v. Paterson Co. 282 U.S. 555, 562-63 (1931); Espaillat v. Berlitz Schools of Languages of America, 383 F. 2d 220, 222 (D.C. Cir. 1967); McCormick On Damages §122 (1935). As to the propriety of considering underlying mineral values, *see* Montana Railway Co. v. Warren, 137 U.S. 348, 352 (1890); United States v. Sowards, 339 F. 2d 401 (10th Cir. 1964); United States v. Silver Queen Mining Co., 285 F. 2d 506 (10th Cir. 1960). *Cf.* Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 Harv. L. Rev. 233, 262 (1930)

"We, therefore, believe that under the circumstances here *it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.* (Emphasis added.)

* * *

"It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." [168] (citations omitted)

The trial judge failed to give effect to the corollary principles, that in fashioning a remedy (1) the plaintiff should be fully compensated and (2) the wrongdoer should not be rewarded with a windfall.[169] In other words, the remedy fashioned was fair to the extent that it left the selling and non selling Indians with approximately the same amount of payments from mineral royalties and Indian claims through the date of trial, but it was unfair to the extent that it failed to restore the selling shareholders to the beneficial title – that enormously valuable interest was left with the beneficiaries of the fraud.

The Court of Appeals compounded the error of the trial judge by holding that market value, *and no other factor*, could be considered in computing damages, and that "the measure of damages . . . *is the profit made by the defendant on resale of stock purchased from the plaintiff.*" [170] (Emphasis added) The latter holding is untenable as a rule of damages, runs counter to the fundamental purpose of the securities laws to protect investors, and is an open invitation to fraud committed through an agent.

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[168] J. I. Case C. v. Borak, 377 U.S. 426, 433 (1964). *Accord,* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386 (1970).

[169] See Mitchell v. Texas Gulf Sulphur Co., ... F.2d ..... (10th Cir., April 26, 1971).

[170] A. 587

In fairness, however, the error of the trial judge was in reality the error of counsel, for the *Reyos* case was tried on a pure damage theory which did not afford the flexibility necessary under the *Borak* doctrine. Thus *AUC* was filed, at a point well in advance of entry of final judgment in *Reyos*, to cover the hiatus between the trial judge's selected remedy and the full restitution which is necessary. Regrettably, the trial judge failed to see the alternative remedy which *AUC* supplied.[171]

If UDC was improperly formed, a speedy, complete, and relatively inexpensive remedy is at hand—merely recognize that fact and confirm the rights of AUC and its members. The United States will suffer no loss, for it makes no claim to title to the minerals and agrees that they are held in trust for those beneficially entitled to them. The *Reyos* plaintiffs, in that event, have been damaged in an amount equal to the lost royalties and other payments, distributed in the form of dividends on the stock during years between 1963-64 to present. That sum is approximately the amount awarded by the trial judge.[172] The purchasers of UDC stock, for the same reason, will not be injured for they have already recovered their investment, but as purchasers in transactions violating the Indian laws they have dealt at their peril, in any event.[173]

The alternative is to award the Indians judgment based upon the value of the underlying assets, which by uncontroverted evidence amounts to in excess of $28,000 per share based upon market values in 1963-64.

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[171] The pertinent dialogue between court and counsel is at A. 559-60.

[172] The value of the damage elements in findings 3, 4, & 5, A.528-29 equal $853.97 per share, and finding 4 (d), A. 503 equals $357.00 per share. In addition, mineral royalties, which averaged $71 per share per year at the time of trial A. 258, 326-28 for eight years equals $568 per share. These figures are not, of course, precise as to years subsequent to trial, and additional evidence should be taken, but the sum of all three items is $1,778.97 per share, which makes the trial judges assumed value of $1500 per share look very conservative.

[173] *See* footnote 119, *supra*, and related text.

In either event, under the recent holding of this Court in *Mills v. Electric Auto-Lite Co.*,[174] plaintiffs should also be awarded their costs in maintaining this action, including reasonable counsel fees. Recovery of such expenses is necessary to fully restore the terminated Utes to the position of the non-selling Indians. Counsel fees, moreover, should comprehend the recovery of the mineral estate, for if they do not, other lawyers will surely not be so foolhardy as to undertake the enormous expenditure of effort necessary to right social injustices such as are involved in this case.

CONCLUSION

The facts of this case present, once more, the recurring problem of the clash between the Indian culture, with its orientation to human values and the common enjoyment of natures bounty, with non-Indian American society, with its fixation on personal property rights and the profit motive. The plight of the terminated Ute is the plight of the entire Indian community in microcosm, and is not so much a criticism of either culture as it is a study in why a whole culture cannot be changed with the stroke of a legislator's pen and why rules against overreaching, whether they be a part of the Indian laws or the securities laws, should not be relaxed.

As in the past, it is the solemn duty of the courts to fairly adjust rights in the event of such a clash. In this case, such an adjustment should include (1) confirmation of AUC's rights as authorized representative, (2) confirmation of AUC's members beneficial interest in the minerals and (3) damages equivalent to the cash proceeds the Indian has been deprived of.

Respectfully submitted,

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[174] 396 U.S. 375 (1970). *See also*, Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939).

APPENDIX OF PERTINENT STATUTES AND REGULATIONS

THE UTE TERMINATION ACT

Enacted August 27, 1954, 68 Stat. 868

Sec. 1 (25 U.S.C. § 677). *Purpose.*

The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

Sec. 2 (25 U.S.C. § 677a). *Definitions.*

For the purposes of sections, 677-677aa of this title—

(a) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677c of this title.

(c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677c of this title.

(d) "Secretary" means Secretary of the Interior.

(e) "Superintendent" means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years.

Sec. 3 (25 U.S.C. § 677b). *Method of determining Ute Indian blood.*

For the purposes of sections 677-677c of this title Ute Indian blood shall be determined in accordance with the constitution and bylaws of the tribe and all tribal ordinances in force and effect on August 27, 1954.

Sec. 4 (25 U.S.C. § 677c). *Transfer of members from full-blood roll to mixed-blood group; time; certification by Secretary.*

Any member of the tribe whose name appears on the proposed roll of full-blood members as provided in section 677g of this title and any person whose name is added to such proposed roll as the result of an appeal to the Secretary may apply to the Superintendent to become identified with and a part of the mixed-blood group; *Provided,* That such application is made within thirty days subsequent to the publication of such proposed roll or in the event of an appeal within thirty days subsequent to notification of the decision on said appeal: *And provided further,* That before such transfer is made upon the official rolls the Secretary shall first certify that, in his opinion, such change in status is not detrimental to the best interest of the person seeking such change.

Sec. 5 (25 U.S.C., § 677d). *Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed-blood members; new membership.*

Effective on the date of publication of the final rolls as provided in section 677g of this title the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in section 677-677aa of this title. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

Sec. 6 (25 U.S.C. § 677e). *Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization.*

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by sections 677-677aa of this title to be taken by the mixed-blood members as a group: *Provided*, That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of said sections.

Sec. 7 (25 U.S.C. § 677f). *Employment of legal counsel for mixed-blood members; fees.*

The mixed-blood members of the tribe as a group may employ legal counsel to accomplish the legal work required on behalf of said group under the terms of sections 677-677aa of this title, and for any other purpose by them deemed necessary or desirable; the choice of counsel and fixing of fees to be subject to the approval of the Secretary until Federal supervision over all of the members of said group and their property is terminated in the manner provided in section 677o of this title.

Sec. 8 (25 U.S.C. § 677g). *Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership.*

The tribe shall have a period of thirty days from August 27, 1954, in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on August 27, 1954. If the tribe fails to submit such proposed rolls within the time specified in section 677-677aa of this title, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such

appeals and his decision thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 677c of this title the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of sections 677-677aa of this title, but said sections shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after August 27, 1954, in the manner provided in the constitution and by-laws of the tribe.

Sec. 9 (25 U.S.C. § 677h). *Sale or other disposition of certain described lands; funds; relief of United States from liability; assigned lands.*

The business committee of the tribe for and on behalf of the full-blood members of said tribe, and the duly authorized representatives for the mixed-blood members of said tribe, acting jointly, are authorized, subject to the approval of the Secretary, to sell, exchange, dispose of, and convey to any purchaser deemed satisfactory to said committee and representatives, any or all of the lands of said tribe described as follows, to wit: [Real property descriptions omitted]

All such sales, exchanges, or other dispositions shall be made upon such terms as said committee and said authorized representatives shall deem satisfactory and may be made pursuant to bids or at private sale, and all funds or other property derived from such sales, exchanges, or other dispositions shall be subject to the terms of sections 677-677aa of this title. Consent by the tribal business committee and said authorized representatives to the sale, exchange, or other disposal of the lands herein described shall relieve the United States of any liability resulting from such sale, exchange, or other disposition. The tribal business committee and said authorized representatives

are further authorized to sell or dispose of tribal assigned lands to the assignees thereof under such terms and conditions as may be agreed upon by the said tribal business committee and said authorized representatives with the assignees, subject, however, to the approval of the Secretary.

Sec. 10 (25 U.S.C. § 677i). *Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon non-agreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions.*

The tribal business committee representing the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided in sections 677-677aa of this title. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable

and fair to both groups. Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribuiton shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribuiton by such corporation shall be subject to the

usual processes of the law. [The last paragraph, dealing with stock in corporations, was not part of the law at the time of the formation of UDC, but was added by an amendment in 1962]

Sec. 11 (25 U.S.C. § 677j). *Advances or expenditures from tribal funds; restrictions on mixed-blood group until adoption of plan for terminating supervision.*

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter deposited in the United States Treasury to the credit of the tribe or either group thereof, shall be available for advance to the tribe or the respective groups, or for expenditure, for such purposes, including per capita payments, as may be designated by the Tribal Business Committee for the full-blood members, and by the authorized agents of the mixed-blood members, and in either event subject to the approval of the Secretary: *Provided,* That the aggregate amount of the expenditures and advances authorized by this section for the mixed-blood group shall not exceed 50 per centum of the total funds of said mixed-blood group after such division, until said mixed-blood group has adopted a plan approved by the Secretary for termination of Federal supervision of said mixed-blood group, as required under section 677*l* of this title. After such termination of Federal supervision, per capita payments to the mixed-blood group shall not be subject to approval of the Secretary.

Sec. 12 (25 U.S.C. § 677k). *Adjustment of debts in making per capita payments to mixed-blood members; execution of mortgages on property.*

Fifty per centum of all per capita payments to any individual mixed-blood member made pursuant to any division or distribution under sections 677-677aa of this title shall have deducted therefrom any sum or sums of money owed by such member to the tribe, whether due or to become due, unless in

the opinion of the Secretary said debts are not adequately secured in which event the entire per capita payment shall be subject to such offset. Any other division, partition or distribution of property to any individual mixed-blood member made pursuant to sections 677-677aa of this title shall be subject to a mortgage to be made in favor of the tribe securing the payment of all sums of money owed by him to the tribe on the date of such division, partition or distribution to such individual mixed-blood member. The Secretary shall require the execution of any mortgage required under this section as a condition to any such division, partition or distribution.

Sec. 13 (25 U.S.C. § 677*l*). *Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan.*

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratiifed by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover—

(i) The proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of

sections 677-677aa of this title, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by sections 677-677aa of this title, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive

such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason

it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group, after deducting reasonable cost of sale and distribution.

Sec. 14 (25 U.S.C. § 677m). *Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954.*

In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954, distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677l of this title, so as to effectively terminate Federal supervision over said assets; then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common.

Sec. 15 (25 U.S.C. § 677n). *Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions.*

Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of he mixed-blood group determines to dispose of his interests in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by

the Secretary. After termination of Federal supervision the requirement of such offer; in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

Sec. 16 (25 U.S.C. § 677o). *Termination of restrictions on individually owned property of the mixed-blood group.*

(a) *Transfer of control of trust property; removal of sales restrictions.*

When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of sections 677-677aa of this title, notwithstanding anything contained in said sections to the contrary.

(b) *Partition or sale by Secretary prior to removal of restrictions.*

Prior to the removal of restrictions in accordance with the provisions of subsection (a) of this section on land owned by more than one person, the Secretary may—

(1) upon request of any of the owners, partition the land and issue to each owner an unrestricted patent or deed for

his individual share, unless such owner is a full-blood member of the tribe or other Indian who owns trust or restricted property, in which event a trust patent or restricted deed shall be issued and such trust may be terminated or such retrictions may be removed when the Secretary determines that the need therefor no longer exists; (2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof and distribute the proceeds of sale to the owners: *Provided*, That before a sale any one or more of the owners may elect to purchase the other interests in the land, or the tribe may elect to purchase the entire interest in the land, at not less than the appraised value thereof.

Sec. 17 (25 U.S.C. § 677p). *Tax exemption; exceptions and time limits; valuation for income tax on gains or losses.*

No distribution of the assets made under the provisions of sections 677-677aa of this title shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance; *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property

distributed to the mixed-blood members of the tribe under the provisions of section 677-677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. [Provisions respecting exemption from corporate income taxes were not part of the original Act, but were added later by amendment.]

Sec. 18 (25 U.S.C. § 677q). *Applicability of decedents' estates laws to individual trust property of mixed-blood members.*

The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. Thereafter, the laws of the several States, Territories, possessions, and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply.

Sec. 19 (25 U.S.C. § 677r). *Indian claims unaffected.*

Nothing in sections 677-677aa of this title shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe.

Sec. 20 (25 U.S.C. § 677s). *Valid leases, permits, liens, etc., unaffected.*

Nothing in sections 677-677aa of this title shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved.

Sec. 21 (25 U.S.C. § 677t). *Water rights.*

Nothing in sections 677-677aa of this title shall abrogate any water rights of the tribe or its members.

Sec. 22 (25 U.C.C. § 677u). *Protection of minors, persons non compos mentis, and other members needing assistance; guardians.*

For the purposes of sections 677-677aa of this title, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate, but appointment of guardians pursuant to State laws, in any case, shall not be required until Federal supervision has terminated.

Sec. 23 (25 U.S.C. § 677v). *Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws.*

Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated,

and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

Sec. 24 (25 U.S.C. § 677w). *Presentation of development program for full-blood group to eventually terminate Federal supervision; annual progress reports.*

Within three months after August 27, 1954, the business committee of the tribe representing the full-blood group thereof shall present to the Secretary a development program calculated to assist in making the tribe and the members thereof self-supporting, without any special Government assistance, with a view of eventually terminating all Federal supervision of the tribe and its members. The tribal business committee, representing the full-blood group shall, through the Secretary of the Interior, make a full and complete annual progress report to the Congress of its activities, and of the expenditures authorized under sections 677-677aa of this title.

Sec. 25 (25 U.S.C. § 677x). *Citizenship status unaffected.*

Nothing in sections 677-677aa of this title, shall affect the status of the members of the tribe as citizens of the United Sates.

Sec. 26 (25 U.S.C. § 677y). *Execution by Secretary of patents, deeds, etc.*

The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments, as may be necessary or appropriate to carry out the provisions of sections 677-677aa of this title, or to establish a marketable and recordable title to any property disposed of pursuant to said sections.

Sec. 27 (25 U.S.C. § 677z). *Rules and regulations; tribal or group referenda.*

The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of sections 677-677aa of

this title, and may, in his descretion, provide for tribal or group referenda on matters pertaining to management or disposition of tribal or group assets.

Sec. 28 (25 U.S.C. § 677aa). *Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.*

Whenever any action pursuant to the provisions of sections 677-677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups.

PERTINENT REGULATIONS UNDER THE TERMINATION ACT

(25 C.F.R. Part 243)

Section 243.2. *Definitions.* As used in this part:

• • •

(c) "Member of the Tribe" means all mixed-blood and full-blood members as defined in (a) and (b) of this section.

• • •

(f) "Tribe" means the Ute, Indian Tribe of the Uintah and Ouray Reservation, Utah.

• • •

(h) "Termination of Federal supervision" means termination of Federal supervision over the particular real estate

involved by the issuance of a patent in fee or other similar title document, and does not mean termination of the wardship relationship between the Indian and the United States on the occasion of the issuance of a so-called "Termination Proclamation" (25 U.S.C. 677v).

Section 243.5 *Offer.* Any mixed-blood member of the tribe desiring to dispose of his interest in real property, as herein defined, prior to termination of Federal supervision over such property, must notify the Superintendent of his desire to dispose thereof, and shall state the price and terms upon which the land is offered for sale or which constitute a bona fide offer to purchase.

Section 243.6 *Notice of offer.* The Superintendent shall notify in writing the corporations and the tribal business committee of the tribe of any offer of sale, and shall post notices of the offer of sale in a conspicuous place in the Uintah and Ouray Agency Office at Fort Duchesne and in the Post Offices of the towns of Roosevelt, Whiterocks, Randelett, Myton, and Fort Duchesne, Utah, for a period of at least ten days. The notices shall specifically describe the terms upon which such sale is to be made and the final date for acceptance of offer from members of the tribe by submission of an appropriate bid.

Section 243.7 *Acceptance of offer.* Upon receipt of an acceptance of the offering from any member of the tribe to purchase such land, the Superintendent shall immediately notify the mixed-blood member making the offer to sell such land and the sale may be completed in accordance with the offer and acceptance. In the event two or more members of the tribe submit an acceptance of the seller's offer, the Superintendent shall call for sealed bids from the parties submitting such acceptances and the sale shall be made to the highest

bidder provided the highest bid equals or exceeds the seller's offering price.

Section 243.8 *Certificate of non-acceptance.* If no acceptance is made by a member of the tribe to purchase such land, the Superintendent shall notify the mixed-blood member making such offer that no member of the tribe has accepted the offer to sell and the mixed-blood member may then sell such land at any time within six months thereafter to any person at the same or greater price and upon the same terms and conditions upon which it was offered to the members. The Superintendent shall furnish to such purchaser a certificate, properly acknowledged for recording, certifying that a proper offer at a price and on terms specified in the certificate was made to members of the tribe in accordance with law and the regulations of the Secretary.

Section 243.9 *Re-offer.* If no sale is made, within a six months' period after the seller has been so notified by the Superintendent, then a new offer must be made to the members of the tribe in the manner set forth in section 243.5.

Secion 243.10 *Subsequent sale.* If, for any reason, a sale should not be consummated after an acceptance by a member of the tribe, as provided in section 243.7, a new offer to sell shall be made to the members of the tribe in the manner set forth in section 243.5.

Section 243.12 *Sale of stock in the corporations.* In the event any stockholder of the corporation determines to sell or dispose of any stock owned by him in any of the corporations prior to August 27, 1964, he shall first offer it to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation and in the manner provided in §§ 243.5 through 243.10, as far as practicable.